(12) (12)

Supreme Court, U.S.
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Nos. 00-596 & 00-597

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A. INC., *et al.*,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

I. BEFORE THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (BOSTON), CASE NO. 99CV11118

1.	5/21/99	Complaint filed. Case assigned to Judge: Young.
2.	6/23/99	Answer by Thomas Reilly in 1:99-cv-11118 to complaint filed.
3.	7/9/99	Consolidated Lead Case. Case is consolidated with 99-11119. 99-11120. 99-11121. All docketing for these cases is to be done in this case.
4.	7/20/99	Motion by Lorillard Tobacco in 1:99-cv-11118. Brown & Williamson in 1:99-cv-11118. R.J. Reynolds Tobacco in 1:99-cv-11118. Philip Morris, Inc. in 1:99-cv-11118 for summary judgment on preemption grounds filed.
5.	7/26/99	Consolidated Lead Case. All docketing for 99-11270 and 99-11135 are to be done in 99-11118.
6.	8/10/99	Unopposed Motion by United States in 1:99-cv-11118 for leave to appear amicus curiae filed.
7.	9/3/99	Amicus Curiae brief by United States in 1:99-cv-11118 filed.
8.	9/15/99	Motion Hearing held.

9.	10/15/99	Motion by Thomas Reilly in 1:99-cv-11118 for partial summary judgment on first amendment claims filed.
10.	10/29/99	Cross motion by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 for partial summary judgment on first amendment claims filed.
11.	11/10/99	Motion by Thomas Reilly in 1:99-cv-11118 for partial summary judgment (Cigar Warnings) filed.
12.	11/10/99	Motion by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118, John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 for partial summary judgment filed.

13.	12/2/99	Chief Judge William G. Young. Memorandum and Order entered. The Court therefore GRANTS IN PART the Tobacco Companies' motion for summary judgment by declaring 940 C.M.R. 21.06 preempted under the Act. With respect to the remaining portions of the challenged Regulations, however, the Court holds that they are not pre-empted and thus GRANTS IN PART the Attorney General's cross-motion for summary judgment. These rulings address the narrow issue of federal pre-emption. The Court, in making these rulings, intends no intimation whatsoever concerning the First Amendment issues presented in this case. See Document #106 for complete Memorandum and Order.
14.	12/2/99	Motion hearing re: motion for partial summary judgment, motion for partial summary judgment (Cigar Warnings), cross motion for partial summary judgment on first amendment claims, and motion for partial summary judgment on first amendment claims. Motion hearing held.

15.	12/2/99	Chief Judge William G. Young. Clerk's Notes: re: Motion hearing held. After hearing the motion for partial summary judgment on first amendment claims taken under advisement cross motion for partial summary judgment on first amendment claims taken under advisement motion for partial summary judgment (Cigar Warnings) taken under advisement motion for partial summary judgment taken under advisement. Court rules with agreement of parties that a trial is not necessary. The decision of the Court based on the pleadings on file will issue by 2/1/00. Final Pretrial set for 12/8/99 is cancelled Court Reporter: D. Womack.
16.	1/7/00	Motion by Lorillard Tobacco in 1:99-cv-11118. Brown & Williamson in 1:99-cv-11118. R.J. Reynolds Tobacco in 1:99-cv-11118. Philip Morris, Inc. in 1:99-cv-11118. U.S. Tobacco Co. in 1:99-cv-11118. Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 for permanent injunction filed.

17.	1/13/00	Motion by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 to stay this action pending appeal or alternatively injunction pending decision on pltfs' summary judgment motions filed.
18.	1/14/00	Motion by Lorillard Tobacco in 1:99-cv-11118 for injunctive relief filed.
19.	1/24/00	Chief Judge William G. Young. Memorandum and Order entered, granting in part, denying in part motion for partial summary judgment on first amendment claims granting in part, denying in part cross motion for partial summary judgment on first amendment claims granting in part, denying in part motion for partial summary judgment (Cigar Warnings) granting in part, denying in part motion for partial summary judgment. See Document #123 for further details.

20.	1/25/00	Chief Judge William G. Young. Judgment entered. "This Court enters judgment declaring that both Mass. Regs. Code tit. 940, 21.00-27.07 and Mass. Regs. Code tit. 940, 22.00-22.09, as construed by this Court's Memorandum and Order dated 1/24/00, are valid exercises of the authority of the Attorney General with the sole exceptions of the parameters of the point-of-sale Tobacco Regulations. 940 C.M.R. 21.05(5)(b), as amended through 1/10/00, and the cognate Cigar Regulations. 940 A.M.R. 22.06(5)(b), as amended through 1/19/00. See Document #124 for further details.
21.	1/25/00	Case closed.
22.	1/25/00	Chief Judge William G. Young. Endorsed Order entered denying motion to stay this action pending appeal alternatively injunction pending decision on pltfs' summary judgment motions.
23.	1/26/00	Notice of appeal by U.S. Tobacco Co. in 1:99-cv-11118 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 19821 Appeal record due on 2/25/00.

24.	1/26/00	Notice of appeal by Lorillard Tobacco in 1:99-cv-11118. Brown & Williamson in 1:99-cv-11118. R.J. Reynolds Tobacco in 1:99-cv-11118. Philip Morris, Inc. in 1:99-cv-11118 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 19813 Appeal record due on 2/25/00.
25.	1/27/00	Notice of appeal by Consolidated Cigar in 1:99-cv-11118. General Cigar Co. in 1:99-cv-11118. Havatampa, Inc. in 1:99-cv-11118. John Middleton, Inc. in 1:99-cv-11118. L.J. Peretti Co., Inc. in 1:99-cv-11118. Swedish Match North in 1:99-cv-11118. Swisher Internationa in 1:99-cv-11118. Tobacco Exporters in 1:99-cv-11118 filed. Fee Status: pd Fee Amount: $ 105.00 Receipt #: 19835 Appeal record due on 2/26/00.
26.	1/28/00	Chief Judge William G. Young. Endorsed Order entered denying motion for permanent injunction.
27.	1/28/00	Chief Judge William G. Young. Endorsed Order entered denying motion for injunctive relief.
28.	2/2/00	Order of the US Court of Appeals re: appeals, the motions for stay pending appeal are allowed. See order for more details.
29.	2/16/00	Notice of cross-appeal by Thomas Reilly in 1:99-cv-11118. filed. Fee Status: unk.

II. BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, CASE NO. 00-1107

1.	1/28/00	Civil Case docketed. Opening forms sent. Notice filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Internation, Appellant Tobacco Exporters, Appellant Swedish Match N.A. Docketing Statement due 2/11/00. Record due 2/7/00. Transcript Report/Order due 2/7/00.
2.	1/28/00	Record filed: 5 volume(s).
3.	1/28/00	Motion filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Internation, Appellant Tobacco Exporters, Appellant Swedish Match N.A. for stay pending appeal. Certificate of service dated 1/27/00.
4.	1/29/00	Response in opposition filed by Appellee Thomas Reilly in 00-1107 to appellants' motion for injunction. Certificate of service date 1/29/00.
5.	1/31/00	Order filed by Judge Bruce M. Selya and Judge Kermit V. Lipez. The motions for stay pending appeal are

allowed. Pending further order of this court, the following sections of Title 940 of the Code of Massachusetts Regulations shall be stayed: § 21.04(1)(a), (c) & (d); § 21.04(2)(c) & (d); § 21.04(5); § 21.04(6); § 22.04; § 22.05; § 22.06(1)(a), (c) & (d); § 22.06(2)(c) & (d); § 22.06(5); § 22.06(6). The appeals shall be consolidated for purposes of briefing and oral argument, and the following expedited briefing schedule shall be observed. Appellants' briefs shall be filed by Friday, February 18, 2000; appellee's brief(s) shall be filed by Friday, March 10, 2000; and any reply brief(s) shall be filed by Thursday, March 16, 2000. In anticipation of holding oral argument in the April 2000 sitting, briefing extensions will not be granted absent extraordinary circumstances.

6. 2/18/00 Brief filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Intl, Appellant Tobacco Exporters, Appellant Swedish Match N.A. in 00-1107, 1117, 1118, 1270-1275. Pages: 51, Copies: 10 delivered by hand. Certificate of service date 2/18/00.

7.	2/25/00	Party Amicus Curiae Association of National Advertisers in 00-1107, Amicus Curiae Association Of National Advertisers in 00-1117 added to case.
8.	2/25/00	Brief filed by Amicus Curiae Assoc of Natl Adv. in 00-1107, Amicus Curiae Assoc of Natl Adv. in 00-1117 in support of appellants. Pages: 29, Copies: 10, delivered by mail. Certificate of service date 2/24/00.
9.	3/10/00	Brief filed by Appellee/Cross-Appellant Thomas Reilly in 00-1107, 00-1270 through 00-1275. Pages: 58, Copies 9: delivered by hand. Certificate of service date 3/10/00.
10.	3/22/00	Reply Brief filed by Consolidated Cigar, General Cigar Co., Havatampa, Inc., John Middleton, Inc., L.J. Peretti Co. Inc., Swisher Intl, Tobacco Exporters, Swedish Match N.A. in 00-1107 and 00-1270 through 00-1275. Pages 29, Copies 9, delivered by hand. Certificate of service date 3/22/00.
11.	4/6/00	Public Note: [00-1107, 00-1117, 00-1118, 00-1270, 00-1271, 00-1272, 00-1273, 00-1274, 00-1275] The Attorney General's office has informed this office that they will not be filing a final responsive brief.
12.	4/7/00	Case Argued 04/07/00. Torruella, Ch. J., Bownes, Lipez, JJ.

13.	4/26/00	Order filed by Chief Judge Juan R. Torruella, Judge Hugh H. Bownes, Judge Kermit V. Lipez. The State of Washington's motion for reconsideration of our order denying it and other states leave to file an amici brief is denied. Although we value the input of the various States, accepting their brief in this case would create a recusal issue for one of the judges on the panel. In keeping with circuit policy, we will not accept an amici brief under these circumstances. So Ordered. in 00-1117, 00-1118.
14.	7/6/00	Letter filed by Attorney General's Office regarding agreements containing consent orders from certain cigar manufacturers, importers or marketers.
15.	7/17/00	Opinion filed. Chief Judge Torruella, Judges Bownes, Lipez. Chief Judge Juan R. Torruella, Authoring Judge. Published.
16.	7/17/00	Judgment filed by Chief Judge Torruella, Judges Bownes, Lipez closing case. The judgment of the district court is affirmed in part and reversed in part in accordance with the opinion issued this day.

17.	8/3/00	Motion filed by Lorillard Tobacco, Brown & Williamson, R.J. Reynolds Tobacco, Philip Morris Inc. to stay mandate pending writ of certiorari. [500282-1] Certificate of service dated 8/2/00.
18.	8/7/00	Motion filed by Appellant Consolidated Cigar, Appellant General Cigar Co, Appellant Havatampa, Inc., Appellant John Middleton, Inc., Appellant L.J. Peretti Co. Inc, Appellant Swisher Intl, Appellant Tobacco Exporters, Appellant Swedish Match N.A. to stay mandate until petition for writ of certiorari. [500297-1] Certificate of service dated 8/4/00.
19.	8/14/00	Order filed by Chief Judge Juan R. Torruella, Judge Kermit V. Lipez granting appellants' motions to stay mandate pending writ of certiorari.
20.	8/15/00	Response filed by Appellee Thomas Reilly to motion to stay mandate. Certificate of service dated 8/14/00.
21.	8/16/00	Motion filed by Appellee Thomas Reilly to reconsider order dated 8/14/00 staying the issuance of mandate. Certificate of service dated 8/16/00.

22.	8/31/00	Order filed by Chief Judge Juan R. Torruella, Judge Hugh H. Bownes, Judge Kermit V. Lipez. (00-1107, 1117, 1118) It is ordered that appellee's motion for reconsideration is granted, and the appellee's opposition having been considered, It is further ordered that appellants' motions to stay the mandate pending a petition for writ of certiorari are allowed in 00-1118.
23.	10/20/00	U.S. Supreme Court Notice filed regarding petition for writ of certiorari. Filed in the Supreme Court on [509001-1] 10/16/00. Supreme Court case number: 00-596.
24.	10/23/00	U.S. Supreme Court Notice filed regarding petition for writ of certiorari. Filed in the Supreme Court on [509294-1] 10/16/00. Supreme Court case number: 00-597.
25.	1/11/01	U.S. Supreme Court Order granting petition for writ of certiorari in 00-1107, granting petition for writ of certiorari in 00-1117, 00-1107, 00-1118, 00-1270, 00-1271, 00-1272, 00-1273, 00-1274, 00-1275 filed in the Supreme Court on 1/8/01. The motion of Washington Legal Foundation for leave to file a brief as amicus curiae is granted also.

[Filed: May 21, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PHILIP MORRIS
INCORPORATED,

Plaintiff,

CIVIL ACTION
NO. _____

v.

THOMAS REILLY,
Attorney General of the
Commonwealth of
Massachusetts,

Defendant.

COMPLAINT

* * * *

2. ...Although the stated goal of the Challenged Regulations is to reduce the incidence of underage tobacco use, the purpose and effect of advertising brands of cigarettes is not to persuade non-smokers to begin to smoke, but rather to alter or reinforce the brand preferences of smokers.

* * * *

15. On-site advertising of tobacco products also constitutes an important means by which convenience stores, gas stations and other retail stores that sell tobacco products generate sales, not only of tobacco products but also of other items on sale. To stimulate traffic in such stores, it is important to communicate to adult smokers that they can purchase

popular brands of cigarettes inside the store. Advertisements for tobacco products often trigger the kind of spontaneous purchase decisions that get customers inside the store.

* * * *

Respectfully submitted,

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[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated May 26, 1999]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES TOBACCO COMPANY,	)	
Plaintiff,	)	Civil Action No. 99CV11135WGY
v.	)	
THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. This is an action to declare null and void, and to enjoin enforcement of, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) (the "Advertising and Marketing Regulations" or the "Regulations" attached as Exhibit A hereto) promulgated by the Attorney General of the Commonwealth of Massachusetts purportedly under Mass. Gen. Laws ch. 93A, § 2(c). The Advertising and Marketing Regulations (1) prohibit constitutionally protected advertising and promotion practices by manufacturers of smokeless tobacco products, in part, by categorically denominating such lawful activities as purportedly "unfair or deceptive" acts or practices, and (2) unconstitutionally restrict protected retail practices regarding the lawful promotion of smokeless tobacco products to adults.

Advertising Restrictions

2. The Advertising and Marketing Regulations would ban the following means of lawful advertising of smokeless tobacco products without regard to whether any particular advertisement is "unfair or deceptive":

(a) Outdoor advertising, including advertising in enclosed stadiums and advertising within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school. § 21.04(5)(a); and

(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment accessible to persons younger than 18 years old, which is located within a one thousand foot radius of any public play-ground, playground area in a public park, elementary school or secondary school. § 21.04(5)(b).

3. The following sign, however, is permitted:

(a) A retailer may place one sign no larger than 576 square inches and containing only black text on a white background stating "Tobacco Products Sold Here" on the outside or visible from the outside of each location where such products are offered for sale. § 21.04(6).

Promotional Restrictions

4. The Advertising and Marketing Regulations would ban the following retail practices, among others:

(a) Sampling, promotional giveaways, or any other free distribution of cigarettes or smokeless tobacco products. § 21.04(1)(a);

(b) Sale or distribution of cigarettes or smokeless tobacco products if any gift or item other than cigarettes or smokeless tobacco is offered in consideration of the purchase. § 21.04(1)(d).

Retail Outlet Sales Restrictions

5. The Advertising and Marketing Regulations would ban the following retail outlet sales practices, among others:

(a) Selling cigarettes or smokeless tobacco products in any manner other than in a direct, face-to-face exchange without the assistance of any vending machines or any other electronic or mechanical device. § 21.04(2)(a);

(b) Using self-service displays of cigarettes or smokeless tobacco products. § 21.04(2)(c); and

(c) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel. § 21.04(2)(d).

Nature of Claims

6. The Advertising and Marketing Regulations promulgated by the Attorney General violate the First and Fourteenth Amendments of the United States Constitution by abridging plaintiff's right to free commercial speech. By purporting to directly regulate interstate commerce outside of Massachusetts, the Advertising and Marketing Regulations also violate the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution. Moreover, as applied to adult-only establishments, certain Regulations are irrational in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Parties

7. United States Tobacco Company ("USTC") is a Delaware corporation with its principal place of business in Connecticut. Through United States Tobacco Manufacturing

Limited Partnership, USTC manufactures brands of smokeless tobacco products in states other than Massachusetts that are sold throughout the United States, including Massachusetts, and in other countries. Through its subsidiary, United States Tobacco Sales and Marketing Company Inc., USTC engages in advertising and marketing activities within the Commonwealth designed to promote sales of its smokeless tobacco products to adults.

8. Thomas F. Reilly is the Attorney General of the Commonwealth of Massachusetts. The former Attorney General promulgated the Advertising and Marketing Regulations purportedly pursuant to the authority granted to the Attorney General under Mass. Gen. Laws ch. 93A, § 2(c).

Jurisdiction and Venue

9. This Court has jurisdiction over this action by virtue of 28 U.S.C. §§ 1331, 1343. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65.

10. Venue is proper in the district pursuant to 28 U.S.C. § 1391(b).

Facts Applicable to All Counts

11. USTC employs various methods of advertising and promoting its products in Massachusetts, including certain advertising, self-service displays and the placement of promotional materials in retail stores. USTC's marketing activities also include offering samples and promotional give-aways in adult-only facilities.

12. The Advertising and Marketing Regulations are an unconstitutional encroachment on plaintiff's ability to lawfully advertise and promote its smokeless tobacco products to adults. The requirements of the Regulations establish an actual and justiciable controversy between plaintiff and defendant as

to whether the Regulations violate the United States Constitution.

13. Compliance with the terms of the Regulations would cause plaintiff irreparable injury, including the abridgement of plaintiff's constitutional right to free commercial speech.

14. The Attorney General's Advertising and Marketing Regulations would prohibit the plaintiff from lawfully engaging in constitutionally protected advertising and promotional activities in violation of the First and Fourteenth Amendments to the United States Constitution. The practical effect of the Regulations is virtually to ban the lawful advertising of smokeless tobacco products in Massachusetts (except in the most rural areas) under the guise of preventing deceptive or unfair trade practices.

15. The Advertising and Marketing Regulations violate the First Amendment of the Constitution by abridging plaintiff's right to free commercial speech. Advertising directed toward the lawful promotion of a legal product cannot unilaterally be prohibited by the Attorney General because advertising that does not directly incite illicit activity is protected commercial speech. The Attorney General's asserted interest in curbing purportedly deceptive or unfair advertising is not substantial enough to justify banning lawful smokeless tobacco advertising directed at adults. Nor do the Regulations materially advance the asserted goal. The Regulations are also not sufficiently narrowly tailored to ensure that they are no more extensive than necessary to advance the interests asserted by the Attorney General. Moreover, the only exception to the Attorney General's blanket rule is for a sign no larger than four square feet "containing only black text on a white background stating 'Tobacco Products Sold Here.'" That paltry exception is plainly insufficient to cure the constitutional deficiencies of the Regulations.

16. Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) of the Regulations would, in effect, ban constitutionally protected advertising and marketing practices in the Commonwealth. The Attorney General cannot constitutionally impose such a pervasive prohibition where truthful, nonmisleading advertising will be abridged along with allegedly deceptive or unfair commercial speech. The protected speech contained within the plaintiff's advertising relates to an activity that is lawful for adults. The Attorney General cannot by unilateral action prohibit constitutionally protected advertising and promotional practices where less restrictive means are available to adequately achieve his purported goals. Because the Regulations are unjustifiably more extensive than necessary to serve the interests they ostensibly were designed to protect, and if enforced would impose unwarranted economic harm to the plaintiff engaged in the lawful activity of selling smokeless tobacco products to adults, they are unconstitutional under the First Amendment.

17. The plaintiff's brands of smokeless tobacco products, which are manufactured in other states, have been distributed in interstate commerce for many years continuously to the present. Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), and (2)(d) of the Regulations prohibit (i) the distribution of free samples; (ii) the distribution of non-tobacco gifts; (iii) selling smokeless products in any manner other than a direct face-to-face exchange; (iv) using self-service displays of smokeless tobacco products; and (v) failing to place smokeless tobacco products out of the reach of all customers, and in a location accessible only to outlet personnel. These Regulations are not limited on their face to Massachusetts. Since these restrictions are not limited to activities occurring in Massachusetts, they purport to directly regulate interstate commerce in violation of the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution.

18. Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d), which (i) ban sampling and other free distribution, (ii) ban gift items in consideration of the purchase of smokeless tobacco products, (iii) permit only direct face-to-face sales, (iv) ban self-service displays, and (v) require that smokeless tobacco products be kept out of the reach of consumers, are irrational as applied to adult-only establishments. The lack of nexus between these sections and their asserted goal is further exacerbated by an internal inconsistency within the Regulations: the point-of-sale restriction expressly limits that provision to "retail establishment(s) accessible to persons younger than 18 years old." § 21.04(5)(b). Unlike section 21.04(5)(b), sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d) are not limited to establishments only accessible to minors. As applied to adult-only establishments, they are not even rationally related to the Attorney General's asserted purpose, and therefore violate the Equal Protection Clause of the Fourteenth Amendment.

19. The Attorney General is a person within the meaning of 42 U.S.C. § 1983 because plaintiff seeks to enjoin him from taking actions in his official capacity. In promulgating the Advertising and Marketing Regulations, ostensibly pursuant to the statutory authority of Mass. Gen. Laws ch. 93A, § 2, the Attorney General acted under color of state law. Enforcement of the Regulations would deprive plaintiff of its rights protected by federal law.

CLAIMS FOR RELIEF

Count I (First Amendment - Free Speech)

20. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 19 of this Complaint as though fully set forth herein.

21. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d) 21.04(5) and 21.04(6) are null and void under the First and Fourteenth

Amendments to the United States Constitution in that they abridge plaintiff's right to free commercial speech.

22. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count II (Commerce Clause)

23. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 22 of this Complaint as though fully set forth herein.

24. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d) are null and void under Article I, Section 8, Clause 3 of the United States Constitution ("Commerce Clause") in that they purport to directly regulate interstate commerce in smokeless tobacco products.

25. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count III (Equal Protection)

26. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 25 of this Complaint as though fully set forth herein.

27. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c) and (2)(d), are null and void under the Equal Protection Clause of the Fourteenth Amendment to the Constitution in that they do not rationally relate to the Attorney General's asserted goal as applied to adult-only establishments.

28. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count IV (42 U.S.C. § 1983)

29. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 28 of this Complaint as though fully set forth herein.

30. Defendant is a person who has acted under color of state law to unlawfully and substantially deprive plaintiff of rights secured by the United States Constitution by promulgating and threatening to enforce the Advertising and Marketing Regulations.

31. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

Count V (Supremacy Clause)

32. Plaintiff incorporates and realleges each allegation contained in paragraphs 1 through 31 of this Complaint as though fully set forth herein.

33. The Advertising and Marketing Regulations, 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) are null and void under the Supremacy Clause, Article VI, Clause 2 of the Constitution, in light of the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401-4408, and/or the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340.

34. Accordingly, plaintiff need not comply with the Attorney General's Regulations in order to continue its lawful

advertising, marketing and promotional activities in the Commonwealth of Massachusetts. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

a. enter a judgment declaring 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6) null and void;

b. enter preliminary and permanent injunctive relief enjoining defendants and their agents from taking any action under or to enforce any provision of 940 CMR 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), (2)(d), 21.04(5) and 21.04(6);

c. award plaintiff its reasonable attorneys' fees and costs; and

d. grant plaintiff such additional or different relief as this Court deems just and proper.

Date: May 26, 1999
Boston, Massachusetts

Respectfully submitted,

/s/ George J. Skelly

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[Dated June 10, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BROWN & WILLIAMSON TOBACCO CORPORATION,	)	
Plaintiff(s),	)	Civil Action No. 99-11121 WGY
v.	)	
THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,	)	
Defendant(s).	)	

AMENDED COMPLAINT

Introduction

1. This is an action to declare null and void, and to enjoin enforcement 940 C.M.R. §§ 21.04(l)(a), (1)(c), (1)(d), 21.04(2)(c), (2)(d), 21.04(5) and 21.04(6) (the "Challenged Regulations"), promulgated by Defendant, the Attorney General of the Commonwealth of Massachusetts. The Challenged Regulations impose unconstitutional restrictions on the ability of the Brown & Williamson Tobacco Corporation ("Brown & Williamson") to advertise and promote its products in the Commonwealth of Massachusetts.

2. Although the stated goal of the Challenged Regulations is to reduce the incidence of underage tobacco use, Defendant has not demonstrated and cannot demonstrate, as the First Amendment requires, that the Challenged Regulations will have the intended effect of, or are necessary to achieve, the stated

goal. It is clear, however, that the Challenged Regulations *will* limit severely Plaintiff's ability to communicate with adults about the products they sell as part of their legitimate competition for the adult consumer market. The restrictions are doubly onerous because Plaintiff's speech already is limited in other ways. The Commonwealth has ample alternative means available to it—including requirements and prohibitions set forth in state statutes and in other regulations promulgated by Defendant that have not been challenged in this action—to address minors' access to tobacco products and the incidence of underage tobacco use while imposing a significantly lesser burden on Plaintiff's ability to communicate with adult consumers concerning tobacco products. Moreover, the Challenged Regulations operate categorically, deeming all covered activities as "unfair or deceptive" under Mass. Gen. Laws c.93A without regard to whether any particular advertisement or promotion is "unfair or deceptive" or otherwise proscribable. As a result, the Challenged Regulations violate Brown & Williamson's right to freedom of speech secured by the First and Fourteenth Amendments of the United States Constitution.

3. Sections 21.04(1)(a), (1)(c), (l)(d), 21.04(5), and 21.04(6) of the Challenged Regulations also violate the Supremacy Clause of the U.S. Constitution by imposing requirements and prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes that are labeled in accordance with the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* Under 15 U.S.C. § 1334(b), these Challenged Regulations are expressly preempted.

4. In addition, certain of the Challenged Regulations ban various retail sales practices and forms of communication in all retail outlets. These practices and communications are even banned in those outlets that are not accessible to individuals under the age of 18 years, despite the rules' alleged purpose

"to address the incidence of cigarette smoking ... by children under legal age," and notwithstanding the fact that such venues are exempted from other provisions of the Challenged Regulations. To the extent that these portions of the Challenged Rules apply even in stores and other venues that are not accessible to individuals under 18, the Challenged Rules are not rationally related to their declared purpose, do not rationally further any legitimate state interest in preventing "unfair or deceptive" acts or practices, and therefore also violate the Equal Protection and Due Process provisions of the Fourteenth Amendment of the United States Constitution, as well as the tailoring requirement of the First and Fourteenth Amendments.

5. To the extent that such regulations purport to prohibit transactions between persons outside of Massachusetts or that otherwise lack a sufficient nexus to Massachusetts, the Challenged Regulations constitute impermissible extraterritorial regulation in violation of the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

6. The implementation of the Challenged Regulations will give rise to irreparable global harm to Brown & Williamson, which faces the denial of its free speech and due process rights and the severe restriction of its ability to compete for retail sales with its competitors, with consequent lost sales the magnitude of which could not adequately be determined. Implementation of the Challenged Regulations will also give rise to irreparable harm to adult consumers of tobacco products, who will be denied lawful communications regarding products they may wish to purchase.

7. The Challenged Regulations are unconstitutional and invalid. They should be preliminarily and permanently enjoined.

Parties

8. Brown & Williamson Tobacco Corporation is a Delaware corporation with its principal place of business in Kentucky. Brown & Williamson manufacturers cigarettes and smokeless tobacco products that are advertised, marketed and sold throughout the United States, including Massachusetts.

9. The defendant, Thomas F. Reilly, is the Attorney General of the Commonwealth of Massachusetts. Defendant's predecessor promulgated the Challenged Regulations, purportedly pursuant to power granted to the Attorney General under Mass. Gen. Laws c.93A, § 2(c).

Jurisdiction and Venue

10. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. §§ 1331 & 1343. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-02 and Fed. R. Civ. Proc. 57 and 65.

11. Venue is proper in the district pursuant to 28 U.S.C. § 1391(b).

Facts Applicable to All Claims

12. Brown & Williamson is a non-Massachusetts corporation that manufactures cigarettes and smokeless tobacco products that are marketed and sold in Massachusetts. Brown & Williamson engages in advertising and promotional activities that are intended to promote sales of its brands to adult smokers. Historically, Brown & Williamson—like manufacturers of other consumer products—has employed a broad range of methods to advertise and promote its products, including print and broadcast advertising, billboards, coupons, various forms of price offers (e.g. "two for one" or "cents off" promotions), brand sponsorship of athletic and cultural events, and placement of posters, decals, self-service displays and other promotional materials at or inside retail stores. Typically, these retail store promotions are pursuant to arrangements that

involve financial incentives offered by Brown & Williamson (or by other manufacturers) to retailers in exchange for the display, at points of sale, of such materials.

13. In recent years, however, Brown and Williamson's speech has been progressively curtailed by law. Brown & Williamson has not advertised cigarettes on radio and television since Congress enacted 15 U.S.C. § 1335, a statute Brown & Williamson has never challenged.

14. In November 1998, Brown & Williamson (and other tobacco companies), faced with lawsuits from various states seeking billions of dollars, entered into an agreement with the Attorneys General of 46 states, including Massachusetts, that resulted in further restrictions on the promotion and advertising of cigarettes (the "Agreement"). The terms of the Agreement required that Brown & Williamson, among other things, discontinue altogether most forms of outdoor or publicly visible cigarette advertising, including such advertising on billboards. This prohibition, like many others-in the Agreement, is incorporated into a judicially enforceable Consent Decree.

15. The Agreement allows many forms of advertising displayed on the property of retail establishments, whether such advertising is located indoors or outside. Such on-site brand advertising (which is subject to a size limitation and other restrictions under the Agreement) constitutes one of the few remaining means for Brown & Williamson to communicate with adult smokers. The retail store environment is the primary place where consumers develop awareness of advertising and brand differences among competing cigarette products. That awareness is developed through the use of signage both inside and outside of the store and through the use of various product displays. Such advertising serves to supply consumers with pertinent information such as price and other brand attributes, to foster brand loyalty and to encourage smokers of other brands to try or switch to the advertised brands.

16. On-site advertising of tobacco products also constitutes an important means by which convenience stores, gas stations, and other small retail stores that sell tobacco products generate sales, not only of tobacco products but also of other items on sale. To stimulate traffic in such stores, it is important to communicate to adult consumers that they can purchase popular brands of cigarettes inside the store. Outdoor advertisements for tobacco products often trigger the kind of spontaneous purchase decisions that get customers inside the store. Once inside, these customers tend to make purchases of other products in addition to tobacco.

17. Self-service displays of cigarettes provide price and other brand information that is crucial to the consumers' choice between products. Importantly, they provide such information at a time and in a manner that the consumer can directly examine the product, review its label, and make an immediate purchase decision.

18. Controlled-service displays are not adequate substitute for self-service displays. Controlled-service inhibits direct access to and comparison of products. They also separate perception of the message from the point-of-purchase decision. As a practical matter, controlled-service displays in most retail establishments must be immediately accessible to the cashier. In many establishments, such accessible space is extremely limited, many products compete for that space, and it contains a clutter of messages that interferes with effective communication about any given product. The limited space available is often devoted primarily or exclusively to brands with a significant market share, frequently in accordance with contracts between the retailer and competing manufacturers. The restrictions in the Challenged Regulations on advertising tobacco products at levels below five feet further restrict the available avenues of communication, and increase the potential that such limited areas will be dominated by the most popular brands that can offer the best deals to retailers. Self-service

display are therefore vital in order to communicate with consumers regarding new brands and promotions or brands that appeal to a smaller share of the market. Because Brown & Williamson manufactures a wide variety or brand styles that do not tend to dominate a particular market, Brown & Williamson is particularly impacted by the ban on this means of communication. Other means of communication about tobacco products are sharply limited by other laws and, in any event, are not adequate.

19. On January 22, 1999, Defendant promulgated regulations severely limiting the advertising and promotion of cigarettes and smokeless tobacco products, including the Challenged Regulations, purportedly pursuant to the Attorney General's rule-making powers under Mass. Gen. Laws. c.93A, § 2(c). (A copy of these regulations is attached to this Complaint as Attachment A.) Sections 21.04(2)(c) and (2)(d) ban all self-service displays of tobacco products in all retail outlets, regardless of whether minors have physical or visual access to them. Sections 21.04(5) and (6) of the Challenged Regulations prohibit virtually all on-site outdoor advertising of tobacco products and any indoor advertising "directed toward" or "visible from" the outside of any retail establishment that is located within 1000 feet of any "public playground or playground area in a public park, elementary school, or secondary school." Within such establishments, no cigarette advertising is permitted to be displayed less than five feet from the floor if the establishment is accessible to minors. The only publicly visible advertising that is permitted is a sign no larger than four square feet "containing only black text on a white background stated 'Tobacco Products Sold Here'."

20. The effect of those prohibitions, individually and cumulatively, will be to ban most on-site advertising and promotion of tobacco products in Massachusetts, except in the most rural areas. The Challenged Regulations will virtually eliminate the already-limited space available for communication

with adult customers at the primary venue for such communication - Massachusetts retailers legally selling tobacco products to adult customers.

21. In addition to its on-site advertising practices, Brown & Williamson has implemented various marketing and promotional programs intended to enhance the loyalty of adult smokers to particular brands. These programs play a significant role in the efforts of Brown & Williamson to compete with other manufacturers of cigarettes for market share. These programs can involve (subject to the limitations set forth in the Agreement) such common consumer marketing practices as the distribution of tobacco products by mail in redemption of coupons or proofs of purchase, distribution of product samples in adult-only establishments, distribution of promotional items attached to packs of cigarettes, and the offering of non-tobacco merchandise to adult customers who submit specified proofs of purchase. These programs typically operate nationwide and are not limited, or directed principally, to Massachusetts consumers.

22. Sections 21.04(1)(a), (c) and (d) of the Challenged Regulations would severely limit these programs by prohibiting any manufacturer of any cigarettes sold in the Commonwealth from engaging in a variety of promotional activities, including promotional give-aways, distribution of cigarettes through the mail, and distribution of tobacco products if any gift or item other than cigarettes or smokeless tobacco is offered in consideration of the purchase. These prohibitions on their face are not limited to promotional activities occurring in Massachusetts or involving Massachusetts consumers. Rather, they purport to restrict such activities by the Plaintiff anywhere.

23. The stated purpose of the Challenged Regulations is to restrict the advertising of tobacco products "in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." Brown & Williamson does not market its products to minors. It limits

participation in promotional programs to adult smokers and it has initiated and supported efforts to discourage underage smoking and sales to minors. In a well-established, mature product market, such as the market for tobacco products, the principal function of advertising and promotion is to either reinforce or change the brand preferences of those who have already made the decision to use the product. Accordingly, the Commonwealth is unlikely to be able to demonstrate that the Challenged Regulations will advance the stated goal of the Commonwealth to any significant degree.

24. There are many steps the Commonwealth and its political subdivisions can take to prevent or discourage smoking by minors. It is illegal in Massachusetts for any person to sell tobacco products to minors or for any person (other than a parent or guardian) to give tobacco products to minors. Mass. Gen. Laws c.270, § 6. The vigorous enforcement of such laws will address the need to reduce youth smoking without interfering with Plaintiff's legitimate commercial speech.

25. Moreover, in contrast to many other jurisdictions, Massachusetts has no general law imposing penalties on minors for possession or use of tobacco products. A credible risk of incurring a significant monetary or other penalty (such as suspension of a driver's license, e.g., 7 Vermont Stat. Ann. § 1005) will address the need to reduce youth smoking without interfering with Plaintiffs legitimate commercial speech.

26. The Commonwealth and its political subdivisions can also address underage smoking by means of educational programs. The Commonwealth has long touted the effectiveness of its antitobacco media campaigns. The recent settlement may result in the payment to Massachusetts of more than 57 billion over a period of years, funds that can be used to create additional anti-smoking programs.

27. The Attorney General's Office in particular has recognized the effectiveness of these alternatives to restricting the advertising of tobacco products to adult consumers. At a press conference at which he announced his decision to agree to the national settlement on behalf of the Commonwealth, Defendant's predecessor publicly announced the "Harshbarger Health Plan," which proposed to use the funds from the settlement to "reduce tobacco use among children and adults ... through tobacco control programs, school-based programs, research and evaluation, and cessation-on-demand programs." Moreover, the Harshbarger Health Plan would "expand enforcement at both the state and local levels against youth access tobacco at retail outlets." In addition, Defendant himself stated (in an April, 1999 op-ed piece in *The Boston Globe*) that "the proportion of illegal sales to minors fell from 48 percent to 8 percent in communities with a funded tobacco control program." Defendant characterized the Massachusetts Department of Public Health's tobacco control program as a "model for reducing smoking" that "has made a difference through education and enforcement."

28. Individually and cumulatively, the Challenged Restrictions impose excessive burdens on speech that will not materially advance the stated governmental interest of reducing teen smoking. The Challenged Regulations would undermine the manufacturers' ability to communicate to adult consumers at the point of purchase, through the mails, and through nontobacco merchandising. These restrictions are in addition to the preexisting restrictions prohibiting or curtailing communication through, *inter alia*, broadcast media, outdoor billboards and transit signs, and stadium displays and sponsorships. Taken together, these provisions severely restrict the Plaintiffs' ability to provide information to adult customers concerning Plaintiffs' products. The Challenged Restrictions also excessively infringe on the rights of adult smokers to receive information about the manufacturers' products. The benefits of the Challenged Regulations, if any,

can be otherwise achieved and do not justify the First Amendment restrictions imposed.

29. Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA") as a "comprehensive Federal program ... with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The "comprehensive" program was designed by Congress to ensure that "the public may be adequately informed about any adverse health effects of smoking," *id.* § 1331(1), while "commerce and the national economy" are "protected to the maximum extent consistent" with that objective, *id.* § 1331(2).

30. To ensure that the public is "adequately informed about any adverse health effects of cigarette smoking," id. § *1331* (1), FCLAA requires each package of cigarettes, and each cigarette advertisement, to carry one of four rotating health warnings, *see id.* § 1333.

31. FCLAA further explicitly provides that: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of § 1333 Id. § 1334(b).

32. All of Plaintiffs tobacco products properly advertised and sold in the Commonwealth of Massachusetts conform to the requirements of FCLAA.

33. The Challenged Regulations impose requirements or prohibitions based on smoking and health with respect to cigarettes which are packaged in conformity with FCLAA. The stated purpose of the Challenged Regulations to "address the incidence of cigarette smoking and smokeless tobacco use by children under legal age" has been repeatedly characterized by the defendant as a "public health" goal, as illustrated by the following examples:

- In a statement made when he accepted the Agreement on behalf of the Commonwealth, the Attorney General identified the "reduc[tion of] tobacco use among children and adults" as a "key public health goal" in Massachusetts. (Prepared Remarks Accepting Tobacco Settlement, November 20, 1998)

- The Chief of the Attorney General's Consumer Protection Bureau said that the proposed Challenged Regulations "would allow us to move aggressively to protec the health and safety of the children of Massachusetts in the event that Congress fails, on its own to create tough new marketing and advertising restrictions on the tobacco industry." *(Boston Globe,* Feb. 14, 1998, at B 1).

- In a public Internet "chat" session on April 22, 1997, the Attorney General stated that "there will be no settlement [of litigation between the Commonwealth and several tobacco companies] unless children can be fully protected, all public health issues are resolved fairly, including complete regulation of cigarette advertising.

  (http ..: //www. townonline. com/~ewton/Speak/ C~hat/transcript42297.html)

Claims for Relief

COUNT I (FIRST AMENDMENT)

34. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 33 of this Amended Complaint as though fully set forth herein.

35. Sections 21.04(2)(c), (2)(d), as well as 21.04(5) and (6) of the Challenged Regulations are null and void by reason of the First and Fourteenth Amendments to the United States Constitution. They individually and cumulatively impose excessive burdens on constitutionally protected commercial

speech by the plaintiff to adult consumers. These burdens will not materially advance the stated governmental interest of reducing use of tobacco products by minors. The government's asserted interest can be effectively served by alternative and more narrowly tailored means which do not restrict speech, and which do not proscribe advertising practices as "unfair or deceptive" without regard to the specific content of any particular advertisement. Moreover, these provisions are impermissibly overbroad. They restrict even non-commercial speech and they apply in settings that are physically and visually inaccessible to minors.

36. Plaintiff has no adequate remedy at law.

COUNT II (PREEMPTION)

37. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 36 of this Amended Complaint as though fully set forth herein.

38. Sections 21.04(1)(a), (l)(c), (1)(d), (5) and (6) of the Challenged Regulations are null and void by reason of Article VI, Section 2 of the United States Constitution ("Supremacy Clause") in that they are preempted by FCLAA.

39. Plaintiff has no adequate remedy at law.

COUNT III (COMMERCE CLAUSE AND DUE PROCESS)

40. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 39 of this Amended Complaint as though fully set forth herein.

41. Sections 21.04(1)(a), (c) and (d) of the Challenged Regulations are null and void by reason of the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution to the extent they purport to regulate or have the effect of regulating transactions and practices that do not occur

in Massachusetts, that do not involve Massachusetts consumers or that otherwise lack a sufficient nexus to Massachusetts, or to the extent they purport to regulate or have the effect of regulating national promotional programs from which Massachusetts, as a practical matter, cannot feasibly be excluded.

42. Plaintiff has no adequate remedy at law.

COUNT IV (EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE FOURTEENTH AMENDMENT)

43. Plaintiff incorporates and realleges each and every allegation contained in paragraphs I through 42 of this Amended Complaint as though fully set forth herein.

44. Sections 21.04 (1)(a) and (d), and 21.04(2)(c) and (d) of the Challenged Regulations, as applied to retail outlets that are not accessible to individuals under the age of 18 years old, are not rationally related to the Commonwealth's stated objective of restricting tobacco use by underage individuals, do not rationally further a legitimate state interest in preventing "unfair or deceptive acts or practices" and therefore violate the Equal Protection and Due Process provisions of the Fourteenth Amendment of the United States Constitution.

45. Plaintiff has no adequate remedy at law.

COUNT V (42 U.S.C. § 1983)

46. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1 through 41 of this Amended Complaint as though fully set forth herein.

47. By promulgating and threatening to enforce the Challenged Regulations, Defendant has unlawfully and substantially deprived Plaintiff of rights secured by the United States Constitution.

48. Defendant is a "person" under 42 U.S.C. § 1983 who has acted under color of state law to deprive Plaintiff of rights secured by the United States Constitution.

49. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that this Court:

(A) enter a judgment declaring that 940 C.M.R. §§ 21.04(1)(a), (1)(c) and (1)(d), 21.04(2)(c) and (2)(d)i 21.04(5), and 21.04(6) are null and void;

(B) enter a permanent injunction enjoining Defendant and his agents from taking any action under or to enforce 940 C.M.R. §§ 21.04(1)(a), (1)(c), and (1)(d), 21.04(2)(c) and (2)(d), 21.04(5) and il.04(6);

(C) enter, after hearing, a preliminary injunction, pending final resolution of this action, enjoining Defendant and his agents from taking any action under or to enforce 940 C.M.R. §§ 21.04(l)(a), (1)(c) and (1)(d), 21.04(2)(c) and (2)(d), 21.04(5), and 21.04(6);

(D) award plaintiff its reasonable attorneys; fees and costs; and

(E) grant plaintiff such additional or different relief as it deems just and proper.

Respectfully submitted,

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BROWN & WILLIAMSON TOBACCO CORPORATION
By its attorney,

/s/ Verne W. Vance, Jr.

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Dated: June 10, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated June 23, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES TOBACCO COMPANY, Plaintiff, v. THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	Civil Action No. 99-CV-11135-WGY

ANSWER OF DEFENDANT THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

The defendant Thomas F. Reilly, as Attorney General of Massachusetts (hereafter the "Attorney General"), hereby answers the separately numbered paragraphs of the plaintiff's Complaint as follows.

1. With respect to the allegations of the first sentence of paragraph 1, the Attorney General states that the Challenged Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A. § 2(c) and denies the characterization "purportedly" in this sentence. The allegations of the first sentence otherwise require no response as they are merely a characterization of the plaintiffs' claims; to the extent that an answer to this sentence might be required, the Attorney General denies that the plaintiff is

entitled to any of the relief requested in this action. The Attorney General denies the allegations of the second sentence of paragraph 1.

2. No response is required to the allegations of paragraph 2 because the Regulations speak for themselves and the plaintiff's assertion that its advertising a conclusion of law that does not require a response.

3. No response is required to the allegations of paragraph 3 because the Regulations speak for themselves.

4. No response is required to the allegations of paragraph 4 because the Regulations speak for themselves.

5. No response is required to the allegations of paragraph 5 because the Regulations speak for themselves.

6. The Attorney General denies the allegations of paragraph 6.

7. The Attorney General admits the allegations of the first and second sentences of paragraph 7, except that the Attorney General is without knowledge or information sufficient to form a belief as to the truth of whether such manufacturing occurs "through United States Tobacco Manufacturing Limited Partnership." The Attorney General admits that USTC engages in advertising and marketing activities within the Commonwealth, and denies the remaining allegations of the third sentence of paragraph 7.

8. The Attorney General admits the allegations of paragraph 8, except that the Attorney General states that the Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A. § 2(c) and denies the characterization "purportedly" in the second sentence of paragraph 8.

9. Paragraph 9 does not require a response as it asserts only conclusions of law; to the extent that a response to the

allegations of this paragraph might be required, the Attorney General denies that the plaintiff is entitled to any of the declaratory or injunctive relief it has requested in this action.

10. Paragraph 10 does not require a response as it asserts only a conclusion of law.

11. The Attorney General admits that "USTC employs various methods of advertising and promoting its products in Massachusetts, including certain advertising" and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 11.

12. The Attorney General denies the allegations of the first sentence of paragraph 12. The second sentence of Paragraph 12 does not require a response as it asserts only a conclusion of law.

13. The Attorney General denies the allegations of paragraph 13.

14. The Attorney General denies the allegations of paragraph 14.

15. The Attorney General denies the allegations of paragraph 15.

16. The Attorney General denies the allegations of the first sentence of paragraph 16. The Attorney General denies the allegations of the second sentence of paragraph 16 and, in particular, denies that the prohibition embodied in the Regulations is "pervasive." With respect to the allegations of the third sentence of paragraph 16, the Attorney General admits that the plaintiff's advertising relates to an activity that is lawful for adults, and denies the remaining allegations of this sentence. The Attorney General states that the fourth sentence of paragraph 16 does not require a response, as it asserts only a conclusion of law; to the extent a response might be required, the Attorney General states that these allegations are too vague and general to allow the Attorney General to frame a response

and he is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations. The Attorney General denies the allegations of the last sentence of paragraph 16.

17. The Attorney General admits the allegations of the first sentence of paragraph 17. No response is required to the allegations of the second sentence of paragraph 17 because the Regulations speak for themselves. The Attorney General denies the allegations of the third and fourth sentences of paragraph 17, especially in view of 940 C.M.R. § 21.01.

18. The Attorney General denies that Sections 21.04(1)(a), (1)(d), 21.04(2)(a), (2)(c), and (2)(d) are irrational as applied to so called adult-only establishments and states that the remaining allegations of the first sentence of paragraph 18 do not require a response as the regulations speak for themselves. The Attorney General denies the allegations of the second sentence of paragraph 18. No response is required to the allegations of the third sentence of paragraph 18 because the regulations speak for themselves. The Attorney General denies the allegations of the fourth sentence of paragraph 18.

19. The Attorney General denies the allegations of the first sentence of paragraph 19. The allegations of the second sentence of paragraph 19 assert only a conclusion of law and therefore require no response. The Attorney General denies the allegations of the third sentence of paragraph 19.

Count I

20. The Attorney General incorporates and restates his responses to paragraphs 1 through 19 of this Answer as though fully set forth.

21. The Attorney General denies the allegations of paragraph 21.

22. The Attorney General denies the allegations of the first sentence of paragraph 22. The second sentence of Paragraph

22 does not require a response as it asserts only a conclusion of law.

Count II

23. The Attorney General incorporates and restates his responses to paragraphs 1 through 22 of this Answer as though fully set forth.

24. The Attorney General denies the allegations of paragraph 24.

25. The Attorney General denies the allegations of the first sentence of paragraph 25. The second sentence of Paragraph 25 does not require a response as it asserts only a conclusion of law.

Count III

26. The Attorney General incorporates and restates his responses to paragraphs 1 through 25 of this Answer as though fully set forth.

27. The Attorney General denies the allegations of paragraph 27.

28. The Attorney General denies the allegations of the first sentence of paragraph 28. The second sentence of Paragraph 28 does not require a response as it asserts only a conclusion of law.

Count IV

29. The Attorney General incorporates and restates his responses to paragraphs 1 through 28 of this Answer as though fully set forth.

30. The Attorney General denies the allegations of paragraph 30.

31. The Attorney General denies the allegations of the first sentence of paragraph 31. The second sentence of Paragraph

31 does not require a response as it asserts only a conclusion of law.

Count V

32. The Attorney General incorporates and restates his responses to paragraphs 1 through 31 of this Answer as though fully set forth.

33. The Attorney General denies the allegations of paragraph 33.

34. The Attorney General denies the allegations of the first sentence of paragraph 34. The second sentence of Paragraph 34 does not require a response as it asserts only a conclusion of law.

First Affirmative Defense

The Complaint, and each claim therein, fail to state a claim upon which relief can be granted.

Second Affirmative Defense

To the extent that any of the plaintiff's claims, expressly or impliedly, challenge the Attorney General's conduct as violative of Massachusetts law or seek relief to require the Attorney General to conform his conduct to Massachusetts law, such claims are barred by the Eleventh Amendment.

WHEREFORE, the defendant Thomas F. Reilly, as Attorney General of Massachusetts, respectfully requests that this Court (1) deny the plaintiff's request for a preliminary or permanent injunction; (2) deny with prejudice all of the relief requested in the Complaint; (3) dismiss the Complaint with prejudice; and (4) grant such other relief as proper.

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ William W. Porter

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Dated: June 23, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated June 28, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BROWN & WILLIAMSON TOBACCO CORPORATION,	)	
Plaintiff,	)	Civil Action No. 99-11121-WGY
v.	)	
THOMAS F. REILLY, Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

ANSWER OF DEFENDANT THOMAS F. REILLY,
ATTORNEY GENERAL OF
THE COMMONWEALTH OF MASSACHUSETTS

The defendant Thomas F. Reilly, as Attorney General of Massachusetts (hereafter the "Attorney General"), hereby answers the separately numbered paragraphs of the plaintiff's Amended Complaint as follows.

1. The first sentence of paragraph 1 requires no response as it is merely a characterization of the plaintiff's claims: to the extent that an answer to this sentence might be required, the Attorney General denies that the plaintiff is entitled to any of the relief requested in this action. The Attorney General denies the allegations of the second sentence of paragraph 1.

2. The Attorney General denies the allegations of the first sentence of paragraph 2, except that, as to the "stated goal of the Challenged Regulations," the regulations speak for

themselves. The Attorney General denies the allegations of the second, third and fourth sentences of paragraph 2. The allegations of the fifth sentence of paragraph 2 do not require a response as the Challenged Regulations speak for themselves; to the extent a response might be required, these allegations are denied. The Attorney General denies the allegations of the last sentence of paragraph 2.

3. The Attorney General denies the allegations of paragraph 3.

4. The allegations of the first and second sentence of paragraph 4 do not require a response as the Regulations speak for themselves: except that the Attorney General denies the allegations of the second sentence of paragraph 4 as to the purpose of the regulations because this is set forth in 940 C.M.R. § 21.01, which speaks for itself, and the quotation from Section 21.01 in this paragraph is incomplete. The Attorney General denies the allegations of the third sentence of paragraph 4.

5. The Attorney General denies the allegations of paragraph 5.

6. The Attorney General denies the allegations of paragraph 6.

7. The Attorney General denies the allegations of paragraph 7.

8. The Attorney General admits the allegations of paragraph 8.

9. The Attorney General admits the allegations of paragraph 9, except that the Attorney General states that the Challenged Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A, § 2(c) and denies the characterization "purportedly" in the second sentence of paragraph 9.

10. Paragraph 10 does not require a response as it asserts only conclusions of law; to the extent that a response might be required, the Attorney General denies that the plaintiff is entitled to any of the declaratory or injunctive relief it has requested in this action.

11. Paragraph 11 does not require a response as it asserts only a conclusion of law.

12. The Attorney General admits the allegations of the first sentence of paragraph 12. The Attorney General admits that the plaintiff "engages in advertising and promotional activities," and denies the remaining allegations of the second sentence of paragraph 12. The Attorney General admits the allegations of the third sentence of paragraph 12. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the fourth sentence of paragraph 12.

13. The allegations of the first sentence of paragraph 13 are too vague and ambiguous to permit the Attorney General to formulate a response: the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations, except that the Attorney General admits that Congress enacted 15 U.S.C. § 1335. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of second sentence of paragraph 13.

14. The Attorney General admits the allegations of the first sentence of paragraph 14, except that the Attorney General is unable to respond to whether such restrictions are "further" because this term in this context is too vague and ambiguous to allow a the Attorney General to frame a response: further answering, the Attorney General states that the Agreement speaks for itself. No response is required to the allegations of the second sentence of paragraph 14, because the

Agreement speaks for itself. The Attorney General admits the allegations of the third sentence of paragraph 14.

15. The Attorney General denies that the Agreement "allows" certain forms of advertising; at most, the Agreement does not prohibit certain forms of advertising; further answering, no response is required to the remaining allegations of the first sentence of paragraph 15, because the Agreement speaks for itself. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 15, except that the Attorney General admits that the Agreement does not prohibit brand advertising at retail establishments under a certain size limitation and subject to certain other restrictions set forth in the Agreement, and the Attorney General denies that tobacco advertising displayed at retail establishments is viewed only by adults or only by adult smokers. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third and fourth sentences of paragraph 15, except that the Attorney General admits that the retail store environment is a location where persons (including children and adult non-smokers) are involuntarily exposed to cigarette advertising. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the fifth sentence of paragraph 15, except that the Attorney General states that tobacco advertising at retail establishments is viewed by children and adult non-smokers and therefore denies that such advertising is viewed only by "consumers."

16. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 16, except that the Attorney General states that on-site advertising influences purchases, or attempted purchases, of tobacco products by minors. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the

allegations of the second, third and fourth sentences of paragraph 16.

17. The Attorney General denies the allegations of the first sentence of paragraph 17. The Attorney General denies the allegations of the second sentence of paragraph 17 except that the Attorney General admits that self-service displays give persons, of all ages, direct physical access to tobacco products.

18. The Attorney General denies the allegations of the first sentence of paragraph 18. The Attorney General admits that controlled service displays inhibit direct access to products, and denies the remaining allegations of the second sentence of paragraph 18. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third, fourth, fifth and sixth sentences of paragraph 18. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the seventh sentence of paragraph 18, except that the Attorney General admits that the provisions of 940 C.M.R. § 21.04(5)(b) reduce to some degree the interior retail space available to advertise tobacco products. The Attorney General denies the allegations of the eighth sentence of paragraph 18. With respect to the allegations of the ninth sentence of paragraph 18, the Attorney General denies the characterization of self service displays as a distinct "means of communication" and is otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations of this sentence. The allegations of the tenth sentence of paragraph 18 are too vague and ambiguous to allow the Attorney General to frame a response; the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations of the tenth sentence of paragraph 18.

19. The Attorney General denies the allegations of the first sentence of paragraph 19, except that the Attorney General admits that the regulations at 940 C.M.R. § 21.00 *et*

seq. were published in the Massachusetts Register on January 22, 1999, pursuant to the Attorney General's rulemaking powers under Mass. Gen. Laws c. 93A, § 2(c). The Attorney General admits the allegations of the second sentence of paragraph 19. No response is required to the allegations of the third, fourth and fifth sentences of paragraph 19, because the regulations speak for themselves and the Attorney General denies any allegation inconsistent with such regulations. The Attorney General denies the allegations of the sixth sentence of paragraph 19.

20. The Attorney General denies the allegations of the first sentence of paragraph 20. The Attorney General denies the allegations of second sentence of paragraph 20, and in particular denies that the plaintiff's advertising is only viewed by and accessible to adults.

21. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

22. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 22; further answering, the allegations in this sentence concerning what Sections 21.04(1)(a), (c) and (d) prohibit are too vague and general to allow the Attorney General to frame a reasonable response and, in any event, the provisions of Section 21.04(1)(a), (c) and (d) speak for themselves and no response is therefore required to the allegation concerning what these sections prohibit. The Attorney General denies the allegations of the second and third sentences of paragraph 22, especially in view of 940 C.M.R. § 21.01.

23. The Attorney General states that the purpose of the regulations set forth at 940 C.M.R. § 21.00, *et seq.* is set forth in 940 C.M.R. § 21.01, which speaks for itself, and the Attorney General denies the allegations of the first sentence of

paragraph 23 because the quotation from Section 21.01 is incomplete. The Attorney General denies the allegations of the second sentence of paragraph 23. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 23. The Attorney General denies the allegations of the fourth and fifth sentences of paragraph 23.

24. The Attorney General admits the allegations of the first and second sentences of paragraph 24. The Attorney General denies the allegations of the third sentence of paragraph 24.

25. As to the first sentence of paragraph 25, the Attorney General admits that Massachusetts does not have a "general law imposing penalties on minors for possess or use of tobacco products," and is without knowledge or information sufficient to form a belief as to the truth of whether this is in "contrast to many other jurisdictions." The Attorney General denies the allegations of the second sentence of paragraph 25.

26. The Attorney General states that the Commonwealth can seek to address, in part, the illegal sales of cigarettes to minors by educational programs and denies any other or additional allegations of the first sentence of paragraph 26. The Attorney General admits that the Massachusetts Department of Public Health has made public certain information to show the benefits of its anti-tobacco media campaigns, and denies any other allegations of the second sentence of paragraph 26. The Attorney General admits the allegations of the third sentence of paragraph 26, except that the Attorney General states that such funds can only be used subject to, and consistently with, legislative appropriation, which could include appropriations for tobacco related programs.

27. The Attorney General denies the allegations of the first sentence of paragraph 27. The Attorney General admits

the allegations of the second, third, fourth and fifth sentences of paragraph 27, except that the Attorney General denies that statements concerning the Harshbarger Health Plan (HHP) or statements in the April 1999, op-ed piece recognize that the HHP or other existing programs are or would be an adequate or sufficient alternative to the regulations at 940 C.M.R. § 21.00, *et seq.*

28. The Attorney General denies the allegations of the first sentence of paragraph 28 and, further answering, states that the "governmental interest" with respect to the regulations is as set forth in the regulations. The allegations of the second sentence of paragraph 28 do not require a response as the Challenged Regulations speak for themselves; to the extent a response might be required, these allegations are denied. The allegations of the third sentence of paragraph 28 are too vague and general to allow the Attorney General to frame a reasonable response: the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations. The Attorney General denies the allegations of the fourth, fifth and sixth sentences of paragraph 28.

29. No response is required to the allegations of paragraph 29 because the FCLAA speaks for itself; to the extent a response to these allegations might be required, they are denied because the quotations from the FCLAA are incomplete and out of context.

30. No response is required to the allegations of paragraph 30 because the FCLAA speaks for itself; to the extent a response to these allegations might be required, they are denied because the quotation from and reference to the FCLAA are incomplete and out of context.

31. No response is required to the allegations of paragraph 31 because the FCLAA speaks for itself.

32. The allegations of paragraph 32 are too vague and ambiguous to allow the Attorney General to frame a response: the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32.

33. The Attorney General denies the allegations of paragraph 33.

Count I

34. The Attorney General incorporates and restates his responses to paragraphs 1 through 33 of this Answer as though fully set forth.

35. The Attorney General denies the allegations of paragraph 35.

36. Paragraph 36 does not require a response as it asserts only a conclusion of law.

Count II

37. The Attorney General incorporates and restates his responses to paragraphs 1 through 36 of this Answer as though fully set forth.

38. The Attorney General denies the allegations of paragraph 38.

39. Paragraph 39 does not require a response as it asserts only a conclusion of law.

Count III

40. The Attorney General incorporates and restates his responses to paragraphs 1 through 39 of this Answer as though fully set forth.

41. The Attorney General denies the allegations of paragraph 40 because Section 21.04(1) only regulates transactions or practices that occur in Massachusetts involving

Massachusetts consumers and does not regulate or have the effect of regulating national promotional programs from which Massachusetts cannot be feasibly excluded.

42. Paragraph 42 does not require a response as it asserts only a conclusion of law.

Count IV

43. The Attorney General incorporates and restates his responses to paragraphs 1 through 42 of this Answer as though fully set forth.

44. The Attorney General denies the allegations of paragraph 44.

45. Paragraph 45 does not require a response as it asserts only a conclusion of law.

Count V

46. The Attorney General incorporates and restates his responses to paragraphs 1 through 45 of this Answer as though fully set forth.

47. The Attorney General denies the allegations of paragraph 47.

48. The Attorney General denies the allegations of paragraph 48.

49. Paragraph 49 does not require a response as it asserts only a conclusion of law.

First Affirmative Defense

The Complaint, and each claim therein, fail to state a claim upon which relief can be granted.

Second Affirmative Defense

To the extent that any of the plaintiff's claims, expressly or impliedly, challenge the Attorney General's conduct as

violative of Massachusetts law or seek relief to require the Attorney General to conform his conduct to Massachusetts law, such claims are barred by the Eleventh Amendment.

WHEREFORE, the defendant Thomas F. Reilly, as Attorney General of Massachusetts, respectfully requests that this Court (1) deny the plaintiff's request for a preliminary or permanent injunction; (2) deny with prejudice all of the relief requested in the Complaint; (3) dismiss the Complaint with prejudice, and (4) grant such other relief as is proper.

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ William W. Porter

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Dated: June 28, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Dated July 1, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSOLIDATED CIGAR CORP.; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; and TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.,	)	Civil Action No. 99 CV 11270 WGY
Plaintiffs,	)	
v.	)	
THOMAS REILLY, in his official capacity as Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

AMENDED COMPLAINT

Nature of Action

1. Plaintiffs, each a manufacturer or retailer of cigars sold throughout the United States including in Massachusetts, bring this action to declare null and void, and to enjoin enforcement of, 940 CMR § 22.00 et seq. (the "Challenged Regulations")

(attached as Exhibit A) promulgated by Defendant, the Attorney General of the Commonwealth of Massachusetts. The Challenged Regulations impose unconstitutional restrictions on Plaintiffs' ability to package, advertise, promote, and sell cigars and little cigars, as defined in 940 CMR § 22.03 (collectively, "cigars").

The Challenged Regulations

2. The two enumerated objectives of the Challenged Regulations are to inform "Massachusetts consumers" about the alleged health risks of cigar smoking and "to prevent access to [cigars] by underage consumers." 940 CMR § 22.01. The Challenged Regulations purportedly seek to achieve those purposes by imposing the following restrictions on the packaging, advertising, promotion, and sale of cigars:

(a) The Challenged Regulations restrict cigar packaging by:

(i) requiring that machine-manufactured cigars, but not hand- rolled premium cigars, display a label that would occupy twenty-five percent of the front or top panel of the package, whichever is larger, stating one of two messages: (1) "Warning: Cigar Smoke Contains Carbon Monoxide And Nicotine, An Addictive Drug," or (2) "Warning: Cigars Are Not A Safe Alternative To Cigarettes Or Smokeless Tobacco Products" (collectively, the "Massachusetts Attorney General's Cigar Statement"), 940 CMR § 22.04(1), (2); and

(ii) requiring that manufacturers and distributors regularly rotate each label constituting the Massachusetts Attorney General's Cigar Statement in alternating sequence on the packages of each brand of machine-manufactured cigars, 940 CMR § 22.04(2) (d).

(b) The Challenged Regulations restrict cigar advertising, promotion, and sale by:

(i) requiring that retailers display one of the two labels constituting the Massachusetts Attorney General's Cigar Statement wherever hand-rolled cigars are sold or machine-manufactured cigars are sold singly, 940 CMR § 22.06(2)(e);

(ii) requiring that twenty percent of the surface area of any cigar advertisement or statement promoting cigars be set aside for one of the two labels constituting the Massachusetts Attorney General's Cigar Statement, 940 CMR § 22.05(1), (2);

(iii) banning all cigar advertising, regardless of whether it is deceptive or unfair, that is outdoors or visible from the outdoors within a thousand-foot radius of any elementary or secondary school, or any public playground, athletic field, swimming pool, baseball diamond, and/or basketball court (except for a single retailer announcement, "Tobacco Products Sold Here"), 940 CMR § 22.06(5)(a);

(iv) banning the placement of cigar advertisements, cigar packages bearing a trademark, or any cigar promotional statement any portion of which is placed lower than five feet from the floor, in retail establishments accessible to persons under eighteen years of age and located within a thousand-foot radius of any elementary or secondary school, or any public playground, athletic field, swimming pool, baseball diamond, and/or basketball court, 940 CMR § 22.06(5)(b);

(v) restricting the sale of cigars in any retail outlet in any manner other than a face-to-face exchange, 940 CMR § 22.06(2)(a),

(vi) banning the use of self-service displays in retail outlets, 940 CMR § 22.06(2)(c),

(vii) requiring retail outlets to place all cigars out of the reach of all consumers, 940 CMR § 22.06(2)(d), and

(viii) banning cigar sales from vending machines in retail outlets, except from vending machines controlled by store personnel in facilities licensed to serve alcoholic beverages for consumption, 940 CMR §§ 22.06(2)(a), (4)(b).

(c) The Challenged Regulations also ban the sampling of cigars, promotional giveaways of cigars, the sale of cigars with any gift or giveaway, the distribution of cigars by redemption of coupons, and the distribution of cigars through the mail, except where the person receiving the mail order cigars supplies a copy of a "valid government-issued identification." 940 CMR §§ 22.06(1)(a), (c) & (d), 22.06(4)(a).

Nature of the Claims

3. The Challenged Regulations, specifically including but not limited to §§ 22.04(1) and (2), 22.05(1) and (2), 22.06(1)(a), 22.06(2)(c), (d), and (e), 22.06(5), and 22.06(6), violate the First and Fourteenth Amendments to the United States Constitution by:

(a) restricting Plaintiffs' rights to communicate with their customers and the public in the exercise of free commercial speech, and

(b) requiring Plaintiffs and others to publish the Massachusetts Attorney General's Cigar Statement.

* * * *

7. The implementation of the Challenged Regulations will cause irreparable harm to Plaintiffs.

8. The Challenged Regulations are unconstitutional and invalid and should be preliminarily and permanently enjoined.

Parties

9. Plaintiff Consolidated Cigar Corporation ("Consolidated," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Ft. Lauderdale, Florida. Consolidated manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. Consolidated sells cigars under brand names including but not limited to Dutch Masters, Backwoods, Muriel, AyC, H. Upmann, Montecristo, Don Diego, and El Producto.

10. Plaintiff General Cigar Co., Inc. ("General Cigar," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in New York, New York. General Cigar manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. General Cigar sells its cigars under brand names including but not limited to Macanudo, Cohiba, Partagas, Punch, Hoyo de Monterey, Bances, Top Stone, Villazon Deluxe, and Villa de Cuba.

11. Plaintiff Havatampa, Inc. ("Havatampa," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Tampa, Florida. Havatampa manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. Havatampa sells its

cigars under brand names including but not limited to Hav-A-Tampa, Phillies, Tampa Nugget, Erik, and Omega.

12. Plaintiff John Middleton, Inc. ("JMI," a "Plaintiff Manufacturer") is a Pennsylvania corporation with its principal place of business in King of Prussia, Pennsylvania. JMI manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. JMI sells its cigars under brand names including but not limited to Black & Mild, Gold & Mild, Middleton's Cherry Blend, Soft & Sweet Vanilla, and Soft Cherry Vanilla.

13. Plaintiff L.J. Peretti Co., Inc. ("Peretti," a "Plaintiff Retailer") is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. Peretti is a tobacconist; it sells only tobacco and related products, including cigars, to adult consumers. Peretti operates one retail store near the Boston Common.

14. Plaintiff Swedish Match North America, Inc. ("Swedish Match," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Richmond, Virginia. Swedish Match, through its wholly owned subsidiary Swedish Match Cigars, Inc., manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed, and sold throughout the United States including in Massachusetts. Swedish Match sells its cigars under brand names including but not limited to White Owl, Garcia Y Vega, Tiparillo, Tijuana Smalls, Braves and Willow Tips by William Penn, and Robert Burns. In addition, Swedish Match is the sole United States importer of cigars sold under the brand name Montague.

15. Plaintiff Swisher International, Inc. ("Swisher," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Darien, Connecticut. Swisher manufactures its cigars outside Massachusetts, and its cigars

are advertised, promoted, distributed and sold throughout the United States including in Massachusetts. Swisher sells cigars under brand names including but not limited to Swisher Sweets, King Edward, Optimo, Blackstone, Bering, Siglo 21 and La Primadora.

16. Plaintiff Tobacco Exporters International (USA) Ltd. ("Tobacco Exporters," a "Plaintiff Manufacturer") is a Delaware corporation with its principal place of business in Tucker, Georgia. Tobacco Exporters manufactures its cigars outside Massachusetts, and its cigars are advertised, promoted, distributed, and sold throughout the United States including in Massachusetts. Tobacco Exporters sells its cigars under brand names including but not limited to Winchester.

17. Defendant Thomas Reilly is the Attorney General of the Commonwealth of Massachusetts. On January 22, 1999, Defendant's predecessor promulgated the Challenged Regulations purportedly pursuant to the Attorney General's authority under Massachusetts General Laws c.93A, § 2(c).

Jurisdiction and Venue

18. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343. Declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65.

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

Facts Applicable to All Claims

20. Each Plaintiff Manufacturer's brands of cigars have been brought from their place of manufacture outside Massachusetts to be sold in Massachusetts from before 1998 continuously to the present. Each Plaintiff Manufacturer desires that its brands of cigars continue to be brought from other states and foreign countries into Massachusetts for sale.

21. In addition to selling cigars in its Massachusetts store, Plaintiff Retailer promotes the sale of cigars to individuals throughout the United States and around the world. Plaintiff Retailer wishes to continue selling cigars outside Massachusetts.

22. The Challenged Regulations require compliance with labeling, advertising, and point-of-sale requirements for Plaintiff Manufacturers' cigars to continue to be sold, and for Plaintiff Retailer to continue to sell cigars, in the Commonwealth of Massachusetts. The Challenged Regulations become effective on August 1, 1999, although Defendant has stated that he will amend the Challenged Regulations to extend the effective date until February 1, 2000. There exists an actual controversy, justiciable in character, between Plaintiffs and Defendant as to whether the Challenged Regulations are lawful under the United States Constitution. Compliance with the challenged Regulations would violate Plaintiffs' constitutional rights and cause each Plaintiff irreparable injury, as would noncompliance.

23. Plaintiffs engage in advertising and promotional activities that are intended to promote sales of cigars to adult smokers. Cigar manufacturers and retailers generally have employed several methods for advertising and promoting cigars, including but not limited to the use of valuable and distinctive trademarks and product packages and displays, print advertising, coupons, radio advertising, various forms of price offers, promotional materials in retail outlets, and distribution and display of promotional materials through other channels.

24. Plaintiff Manufacturers' cigars are advertised in national and regional publications, such as Chief Executive, Cigar Aficionado, Esquire, Field & Stream, Financial World, Forbes, Game & Fish, Golf Magazine, Gourmet, J&R Catalogue, Hemispheres (United Airlines in-flight magazine), Senior Golf, Smoke, Smokeshop, and Wine Spectator.

25. On-site advertising of cigars also constitutes an important means by which cigars are promoted. Convenience stores, gas stations, drug stores, discount stores, tobacconists, and other retail outlets promote sales of cigars, like most other products, by using self-service in-store displays and advertisements. In some cases, manufacturers and retail outlets engage in cooperative advertising where cigars are promoted along with other products on sale at the stores. To stimulate traffic into such stores and sales in the store, it is important to communicate to adult consumers that they can purchase popular brands of cigars inside the store.

26. Retail product display is another critical means by which cigar manufacturers compete with one another and manufacturers and retailers communicate with adult consumers. In-store self-service displays of cigars provide price and other brand information that is crucial to the adult consumers' choice among products. Because of major differences in the look and feel of cigar brands, adult consumers must have direct access to the cigar in its package to make comparisons with other cigars. For example, price comparison between brands is facilitated by comparing cigars and/or cigar packages side-by-side. Importantly, such displays permit the adult consumer to examine the product directly in the manner that the adult consumer chooses, and then make an immediate purchase decision. The manner in which adult consumers examine cigars at retail establishments and make their cigar purchase decisions has been essentially unchanged over the years.

* * * *

36. Although the Challenged Regulations refer to a "false perception that cigars are a safe alternative to cigarettes," there are no findings that Plaintiffs' cigar advertising and promotion in any way causes that claimed perception. There are no findings that the claimed perception is a significant factor in cigar purchase decisions. There are no

findings that any cigar advertisements promote the use of cigars as a safer or healthier alternative to cigarette smoking. There are no findings that any cigar advertisements and promotions (such as cigar dinners) are not directed to adult consumers.

37. The effect of the advertising restrictions in the Challenged Regulations is to ban all cigar advertisements that can be viewed from the outdoors in large sections of virtually every populated area of Massachusetts, regardless of whether these advertisements are deceptive or unfair.

* * * *

41. The Challenged Regulations, specifically including but not limited to § 22.06(2)(c) and (d), require Plaintiff Retailer—even though it operates an adult-only store—and all other cigar retailers to place products out of reach of consumers and in a location accessible only to outlet personnel. As a result, Plaintiff Retailer's customers will not be able to see, touch or smell the cigars it sells. To individuals who purchase cigars, such tactile interaction with the products is preferred. A cigar is not a fungible commodity, like a candy bar or a can of soda, that can be purchased without an individual inspection. Each brand of cigar has very individual characteristics. If Plaintiff Retailer's and other retailers' customers are denied the opportunity personally to compare and test individual cigars, the customary manner in which adult consumers have selected and purchased cigars over the years will be altered, and the product information available to adult consumers at the point of purchase will be severely limited. As a result, Plaintiff Retailer's business, like those of other retailers, will be injured.

42. Moreover, the Challenged Regulations, specifically including but not limited to § 22.06(5), require cigar retailers to remove all signs visible from the street advertising their stores and products (except for a non-descript statement

"Tobacco Products Sold Here") if their stores operate fewer than 1000 feet from, among other things, a school, playground, or baseball diamond or basketball court. Such a restriction will have drastic effects on cigar retailers. For instance, because Plaintiff Retailer's store is located less than 1000 feet from Boston Common, which contains baseball diamonds, Plaintiff Retailer will be forced to remove any promotional materials, advertisements, and signs from its front window. As a result, Plaintiff Retailer, like many other cigar retailers, will not be able to communicate to its adult customers information about its cigars, including even the fact that it sells them. Therefore, Plaintiff Retailer's business, like those of other retailers, will suffer.

43. In addition, the Challenged Regulations, specifically including but not limited to §§ 22.06(2)(c) and (d), will compel Plaintiff Retailer and other retailers to redesign their stores. By effectively requiring such retailers to make all cigars inaccessible to their customers, the Challenged Regulations will oblige retailers to expand restricted areas (where physically possible to do so), such as those behind the counter, or reduce the number and selection of cigars available for sale.

44. Significantly, the Challenged Regulations, specifically including but not limited to § 22.06(3)(a), require retailers who, like Plaintiff Retailer, employ six or more individuals to use their own funds to hire a "secret shopper." The secret shopper will periodically and surreptitiously visit the stores, including adult-only stores, to spy on employees to ensure compliance with the Challenged Regulations. Such an expense would dramatically diminish Plaintiff Retailer's and other retailers' profits.

45. The Challenged Regulations, specifically including but not limited to § 22.06(2)(c) and (d), that require retailers to make cigars inaccessible to consumers, also severely affect Plaintiff Manufacturers. The practical effect of these

restrictions will be to make many brands and styles of cigars invisible to consumers in the store and effectively eliminate a critically important channel of communication with adult consumers. As a result, Plaintiff Manufacturers' businesses will suffer.

46. Defendant's complete prohibition on the use of self-service displays, even where no issue of underage access is presented, also infringes on the rights of adult consumers to receive useful product information. 940 CMR § 22.06(2)(c). Such displays are a standard competitive tool available to marketers of other lawful consumer products. The prohibition, especially when combined with the other advertising restrictions contained in the Challenged Regulations, means that as a practical matter the adult consumer is deprived of information relevant to his choice at the very moment when that choice is being made and the information is of utmost importance.

47. Plaintiffs, and cigar manufacturers and retailers generally, employ various marketing and promotional programs intended to attract adult cigar smokers and enhance the loyalty of adult smokers to particular brands. These programs play a significant role in the competition among cigar manufacturers. They also provide to adult consumers information about cigars that permits them to make informed choices about quality, price, and other competitive attributes of cigars.

48. There are many steps Defendant and his agents could take to advance Defendant's stated purpose of "prevent[ing] access to cigars by underage consumers" (940 CMR § 22.01) without restricting or eliminating traditional channels of communication with adult consumers and customary methods of adult access to cigars at the time of the purchase decision, and without burdening interstate commerce. For example, it is illegal in Massachusetts for any person to sell tobacco products such as cigars to minors, or for any person (other than a parent or guardian) to give tobacco products to

minors. Mass. Gen. Laws c.270, § 6. Vigorous enforcement of such laws can reduce youth smoking. The Commonwealth and its political subdivisions can also address underage smoking by means of educational programs. The Commonwealth has long claimed the effectiveness of its anti-tobacco media campaigns. For example, Defendant himself stated (in an April 6, 1999 op-ed piece in *The Boston Globe*) that as a result of local education and law enforcement efforts "the proportion of illegal sales to minors fell from 48 percent to 8 percent in communities with a funded tobacco control program." Defendant characterized the Department of Public Health's tobacco control program as a "model for reducing smoking" that "has made a difference through education and enforcement." Id.

50. Implementation of the Challenged Regulations will cause irreparable harm to each Plaintiff who faces the denial of its free speech rights and the severe restriction of its ability to compete for retail sales. In addition, implementation of the Challenged Regulations will cause harm to adult cigar consumers who will be denied lawful access to, and information regarding, products they may wish to purchase. In addition, the profound interference with the interstate commerce in cigars caused by the Challenged Regulations will severely burden the business of Plaintiff Manufacturers.

51. The Attorney General of the Commonwealth of Massachusetts is a person within the meaning of 42 U.S.C. § 1983 because Plaintiffs seek to enjoin him from taking actions in his official capacity.

Claims for Relief

COUNT I (FREE SPEECH)

52. Plaintiffs incorporate and reallege each and every allegation contained in paragraphs 1 through 51 of this Complaint as though fully set forth herein.

53. The Challenged Regulations, specifically including but not limited to §§ 22.04(1) and (2), 22.05(1) and (2), 22.06(1)(a), 22.06(2)(c), (d) and (e), 22.06(5), and 22.06(6), are null and void by reason of the First and Fourteenth Amendments to the United States Constitution because they impose prohibitions and restrictions on constitutionally protected commercial speech by Plaintiffs to adult consumers. The Defendant cannot show the prohibitions and restrictions will directly and materially advance and are reasonably related to the stated government interests. Defendant's interest can be served effectively by means that do not unconstitutionally restrict speech.

54. Plaintiffs have no adequate remedy at law.

* * * *

Respectfully submitted,

CONSOLIDATED CIGAR CORP.; GENERAL CIGAR CO., INC.; HAVATAMPA, INC.; JOHN MIDDLETON, INC.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.; AND TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.

By their attorneys,

/s/ Peter G. Hermes

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Dated: July 1, 1999

[Dated July 22, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSOLIDATED CIGAR CORP., et al.,	)	
	)	Civil Action No.
Plaintiffs,	)	99-CV-11270-WGY
v.	)	
THOMAS F. REILLY, as Attorney General of the Commonwealth of Massachusetts,	)	
Defendant.	)	

ANSWER OF DEFENDANT THOMAS F. REILLY,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS,
TO THE AMENDED COMPLAINT

The defendant Thomas F. Reilly, as Attorney General of Massachusetts (hereafter the "Attorney General"), hereby answers the separately numbered paragraphs of the plaintiff's Amended Complaint as follows

1. The first sentence of paragraph 1 requires no response as it is merely a characterization of the plaintiffs' claims; to the extent that an answer to this sentence might be required, the Attorney General denies that the plaintiffs are entitled to any of the relief requested in this action and admits that a copy of 940 CMR 22.00, *et seq.* is attached as Exhibit A to the Amended Complaint and admits that the Attorney General of Massachusetts promulgated 940 CMR 22.00, *et seq.* The

Attorney General denies the allegations of the second sentence of paragraph 1.

2. The allegations of the first sentence of paragraph 2 do not require a response because the regulations speak for themselves; to the extent a response to these allegations might be required, they are denied as the quotations from the regulations are incomplete and out of context. With respect to the allegations of the second sentence of paragraph 2, the Attorney General denies the characterization "purportedly" and states that the remaining allegations do not require a response as the regulations speak for themselves. The allegations of paragraphs 2(a), 2(b) and 2(c) do not require a response because the regulations speak for themselves; to the extent a response might be required, the Attorney General denies any allegation inconsistent with the regulations.

3. The Attorney General denies the allegations of paragraph 3.

* * * *

7. The Attorney General denies the allegations of paragraph 7.

8. The Attorney General denies the allegations of paragraph 8.

9. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9.

10. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

11. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11.

12. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13.

14. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14.

15. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. The Attorney General admits the allegations of paragraph 17, except that the Attorney General states that the Challenged Regulations were promulgated pursuant to the power granted to the Attorney General under Mass. Gen. Laws c. 93A, § 2(c) and denies the characterization "purportedly" in the second sentence of paragraph 17.

18. Paragraph 18 does not require a response as it asserts only conclusions of law; to the extent that a response to the allegations of this paragraph might be required, the Attorney General denies that the plaintiffs are entitled to any of the declaratory or injunctive relief they have requested in this action.

19. Paragraph 19 does not require a response as it asserts only a conclusion of law.

20. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20.

21. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21.

22. The allegations of the first sentence of paragraph 22 do not require a response because the regulations speak for themselves. The Attorney General admits the allegations of the second sentence of paragraph 22, and states that he has filed an emergency regulation to amend the regulations to make them effective February 1, 2000. The third sentence of paragraph 22 does not require a response as it asserts only a conclusion of law. The Attorney General denies the allegations of the fourth sentence of paragraph 22.

23. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 23. The Attorney General admits the allegation that "cigar manufacturers and retailers generally have employed several methods for advertising and promoting cigars," and is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of the second sentence of paragraph 23.

24. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 24.

25. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 25. The Attorney General admits the allegations of the second sentence of paragraph 25, except that the Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations that retail outlets promote sales of cigars "like most other products." The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third and fourth sentences of paragraph 25.

26. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first and second sentences of paragraph 26. The Attorney General denies the allegations of the third and fourth sentences of paragraph 26. The Attorney General admits that self service displays permit all persons (adults and minors) to examine cigar products directly and in the manner that the person chooses, and then make a purchase decision, and, further answering, states that other modes of sale permitted under the regulations permit a similar examination and purchase decision; the Attorney General denies the remaining allegation of the fifth sentence of paragraph 26 or any allegations of this sentence inconsistent with the foregoing. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the sixth sentence of paragraph 26.

* * * *

36. The allegations of paragraph 36 do not require a response because the regulations speak for themselves; to the extent that a response to these allegations might be required, the Attorney General states that no applicable provision of law required the Attorney General to make express "findings" as referred to in paragraph 36, admits that the text of the regulations does not contain the "findings" described in this sentence, and denies the remaining allegations of paragraph 36.

37. The Attorney General denies the allegations of paragraph 37.

* * * *

41. The allegations of the first sentence of paragraph 41 do not require a response because the regulations speak for themselves, except that the Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegation that Plaintiff Retailer "operates an adult-only store." The Attorney General denies the allegations of the

second sentence of paragraph 41. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third, fourth and fifth sentences of paragraph 41. With respect to the allegations of the sixth sentence of paragraph 41, the Attorney General denies, in particular, that Plaintiff Retailer's and other retailers' customers will be denied the opportunity personally to compare and test individual cigars, and therefore also denies the remaining allegations of this sentence. The Attorney General denies the allegations of the last sentence of paragraph 41.

42. The Attorney General denies that the regulations require retailers to remove signs advertising their stores and states that no response is required to the other allegations of the first sentence of paragraph 42 because the regulations speak for themselves; to the extent a response to these allegations might be required, they are denied. The Attorney General denies the allegations of the second sentence of paragraph 42. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of paragraph 42. The Attorney General denies the allegations of the fourth and fifth sentences of paragraph 42.

43. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 43.

44. The Attorney General denies the allegations of the first sentence of paragraph 44. The allegations of the second sentence of paragraph 44 do not require a response because the regulations speak for themselves; to the extent that a response might be required, the Attorney General states that these allegations are too vague and ambiguous to allow him to frame a response, and he is therefore without knowledge or information sufficient to form a belief as to the truth of such allegations. The Attorney General denies the allegations of the last sentence of paragraph 44.

45. The Attorney General denies the allegations of paragraph 45.

46. The Attorney General denies the allegations of the first sentence of paragraph 46. The Attorney General is without knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 46. The Attorney General denies the allegations of the third sentence of paragraph 46.

47. Because the allegations of paragraph 47 do not specify or describe the "marketing and promotional programs" that are referred to, the allegations of this paragraph are too vague and general to allow the Attorney General to frame a response; the Attorney General is therefore without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 47.

48. With respect to the allegations of the first sentence of paragraph 48, the Attorney General admits that there are certain steps that he has taken and could continue to take, in addition to promulgating the regulations, that would seek to advance the goal of preventing access to cigars by underage consumers; the Attorney General denies the remaining allegations of the first sentence of paragraph 48 which purport to characterize the regulations and denies all other allegations of the first sentence of paragraph 48. The Attorney General admits the allegations of the second and third sentences of paragraph 48. With respect to the allegations of the fourth sentence of paragraph 48, the Attorney General admits that the Commonwealth can seek to address underage smoking by means of educational programs, but denies that this, alone, is adequate. With respect to the allegations of the fifth sentence of paragraph 48, the Attorney General admits that the Massachusetts Department of Public Health has made public certain information to show the benefits of its anti-tobacco media campaigns, and denies any other allegations of this sentence. With respect to the allegations of the sixth and

seventh sentences of paragraph 48, the Attorney General admits that he made certain statements in an op-ed piece in the *Boston Globe* on April 6, 1999, and states that such statements speak for themselves and denies that such statements indicate that existing Massachusetts tobacco control programs are or would be an adequate or sufficient alternative to the regulations at 940 C.M.R. § 21.00, *et seq.* and 940 C.M.R. §22.00, *et seq.*

* * * *

50. The Attorney General denies the allegations of paragraph 50.

51. Paragraph 51 does not require a response as it asserts only conclusions of law.

Count I

52. The Attorney General incorporates and restates his responses to paragraphs 1 through 51 of this Answer as though fully set forth.

53. The Attorney General denies the allegations of paragraph 53.

54. Paragraph 54 does not require a response as it asserts only a conclusion of law.

* * * *

First Affirmative Defense

The Amended Complaint, and each claim therein, fail to state a claim upon which relief can be granted.

Second Affirmative Defense

To the extent that any of the plaintiffs' claims, expressly or impliedly, in whole or in part, challenge the Attorney General's conduct as violative of Massachusetts law or seek relief to require the Attorney General to conform his conduct to

Massachusetts law, such claims are barred by the Eleventh Amendment.

WHEREFORE, the defendant Thomas F. Reilly, as Attorney General of Massachusetts, respectfully requests that this Court (1) deny the plaintiffs' request for a preliminary or permanent injunction; (2) deny with prejudice all of the relief requested in the Complaint; (3) dismiss the Complaint with prejudice, and (4) grant such other relief as is proper.

THOMAS F. REILLY
ATTORNEY GENERAL

/s/ William W. Porter

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Dated: July 22, 1999

[CERTIFICATE OF SERVICE Omitted in Printing]

[Filed October 15, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	CIVIL ACTION NO.99-11118-WGY
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	

PHILIP MORRIS INCORPORATED,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

AFFIDAVIT OF NANCY COVILLE

I, Nancy Coville, depose and state the following:

1. I am an Education Specialist in Learning Support Services at the Massachusetts Department of Education ("DOE"). I have held this position since 1993. I have a bachelor degree from Framingham State College and have taken additional graduate courses. As part of my job, I supervise the administration of the Health Protection Fund Grants.

2. DOE distributes the Health Protection Fund Grants to public school districts across Massachusetts. The amount of each grant is based on the student population of each school

district, with approximately $24 allocated for each child. In fiscal year 1998, the Health Protection Fund Grants to individual public school districts totaled approximately $21 million.

3. The purpose of the grants is to provide comprehensive health education to students with a focus on tobacco education, prevention, and cessation. Each school district must submit an application for a Health Protection Fund Grant for each fiscal year. The grant application has certain stated priorities to be addressed by the school districts. Among the stated priorities are: tobacco prevention education for all students, including smoking cessation programs; and a local health education program which includes the maintenance of a healthy school climate and environment, with special emphasis on enforcement of an effective Tobacco Free Schools policy. The document attached as Exhibit A to this affidavit is a true and accurate copy of the Health Protection Fund Grant application form for fiscal year 2000.

4. In part because of the Health Protection Fund Grants: 95% of health educators are now teaching tobacco use prevention, with the greatest emphasis being placed on middle school students; all Massachusetts school districts now have tobacco-free school policies; over half of school districts provide tobacco education to parents; and, three-quarters have tobacco control programs linked to community programs.

* * * *

SIGNED AND SWORN UNDER THE PAINS AND PENALTIES OF PERJURY THIS 12th DAY OF OCTOBER, 1999.

/s/ Nancy Coville
Nancy Coville

Sworn before me this 12th day of October, 1999.

/s/ Rhoda E. Schneider
Notary Public

My Commission expires:

[Filed October 15, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	CIVIL ACTION NO.99-11118-WGY
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	

PHILIP MORRIS INCORPORATED,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)
BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

AFFIDAVIT OF GREGORY N. CONNOLLY

I, Gregory N. Connolly, depose and state the following:

1. I am the Director of the Massachusetts Tobacco Control Program (MTCP) of the Massachusetts Department of Public Health. I have held this position since the formation of the Massachusetts Tobacco Control Program in 1993. From 1986 to 1993 I was the director of the Office on Non-Smoking and Health. I have a D.M.D. from Tufts University School of Dental Medicine, and a Masters degree from the Harvard University School of Public Health.

2. As Director of the MTCP, I control all aspects of the MTCP.

3. The MTCP is funded by appropriations from the Massachusetts Health Protection Fund, which receives revenue from a 25-cent excise tax on each pack of cigarettes and 25 percent tax on each unit of smokeless tobacco sold in the Commonwealth. The MTCP budget for fiscal year 1995 was $43.1 million. The MTCP budget for fiscal year 1996 was $41.8 million. The MTCP budget for fiscal year 1997 was $36.8 million. The MTCP budget for fiscal year 1999 is $36.9 million.

4. The MTCP funds, supports or implements a wide variety of programs in Massachusetts to: reduce tobacco consumption by persuading users to quit; prevent the initiation of tobacco use among young people, and reduce their access to tobacco; and protect non-smokers by reducing exposure to environmental tobacco smoke. In August 1999, the Centers for Disease Control (CDC) of the U.S. Department of Health and Human services issued a report entitled *Best Practices for Comprehensive Tobacco Control Programs—August 1999*, which recognized Massachusetts, along with California, as the only two states in the nation that currently have programs implementing all of the CDC's recommendations for comprehensive state tobacco control. These programs include, but are not limited to, those described below in this affidavit. The document attached as Exhibit A to this affidavit is a true and accurate copy of the CDC report *Best Practices for Comprehensive Tobacco Control Programs—August 1999*. The document attached as Exhibit B to this affidavit is a true and accurate copy of the portion of the CDC report *State Tobacco Control Highlights—1999* that relates to Massachusetts.

5. The MTCP began a tobacco education media campaign in October, 1993. The mass media campaign uses television, radio, billboard, and print advertising to inform Massachusetts residents about the dangers of tobacco use. At times, the MTCP media campaign has carried advertisements specifically

targeted at youth. In addition to information on health risks, these advertisements presented messages to counter some of the beliefs that make tobacco use acceptable or desirable among young people. For example, one series of ads emphasized that young people can quickly become addicted to nicotine, while another countered the idea that smoking makes one socially attractive. The Massachusetts Tobacco Control Program media campaign budget was $16 million for fiscal year 1994, $14 million for fiscal year 1995, $13 million for fiscal year 1996, $11.70 million for fiscal year 1997, and $11.21 million for fiscal year 1998. The Massachusetts Tobacco Control Program media campaign budget is $11 million for fiscal year 1999.

6. The MTCP supports and funds a variety of community-based programs, particularly with local Boards of Health and local Health Departments. Some of the MTCP funding provides technical assistance and support for enactment and enforcement of local ordinances and regulations designed to make it harder for youth to buy tobacco products from retail establishments and vending machines, and to protect the public from environmental tobacco smoke. Boards of Health and Health Department Programs also provide important services to the general public such as smoking cessation services.

7. The population affected by local restrictions on youth access to tobacco has risen dramatically since the MTCP effort began. For example, 177 Massachusetts cities and towns, accounting for more than three-quarters of the population of the Commonwealth, now require merchants who sell tobacco products to be licensed. This represents a dramatic change over the lifetime of the MTCP, as less than 5 percent of the population was covered by such requirements in 1992. Local laws limiting free-standing "self-service" displays of tobacco products have been adopted almost as broadly in communities, representing more than two-thirds of Massachusetts residents. Also, as of June 1998, 87 towns have completely banned

vending machines, 75 require the use of "lockout" devices on vending machines, and 56 limit vending machines to locations that are not accessible to youth.

8. During the time period from January of 1994 to June of 1998, the efforts of the local Boards of Health and Health Departments, together with other local-MTCP-funded programs, to monitor and enforce youth access provisions included:

a. 46,568 checks of retail premises to make sure that they had appropriate signs indicating the prohibition on sales to minors;

b. 31,603 controlled buying attempts, in which youth under age 18 attempted to purchase cigarettes and reported on the results;

c. 7,561 checks of compliance with vending machine restrictions.

9. At the time of the start of the MTCP warnings were given out to merchants for most violations, and the citation rate in 1994 (which is the percentage of observed violations which result in a citation) was just 13%. By the first half of 1998, the citation rate had climbed to 53%.

10. From January of 1994 to June of 1998 illegal sales have resulted in a total of 1,910 citations and $139,325 in levied fines. In March-May of 1994, 48% of all attempts resulted in illegal sales of cigarettes. Since that time, retailer compliance has improved, and the violation rate was a statewide average of 19.3% in 1998 for both MTCP-funded and non-MTCP-funded communities, and under 10% in MTCP-funded communities in April-June of 1998.

11. In addition to the compliance checks performed by the local Boards of Health and Health Departments, the Massachusetts Tobacco Control Program carries out compliance checks as part of a project funded by the U.S. Food

and Drug Administration. These compliance checks were performed in communities across Massachusetts, even where there was no local tobacco control program. Over 5,000 compliance checks were carried out in 1998, and over 8,000 compliance checks have already been performed in 1999. The average non-compliance rate was 22.8% in 1998, and the average non-compliance rate for the first six months of 1999 is 29.7%.

12. The MTCP works together with the Massachusetts Department of Education to support comprehensive health education in public schools, including education on tobacco prevention and smoking cessation. The MTCP also creates and funds other educational initiatives. For example, a new MTCP initiative called "Smoke Screeners" teaches students to become more critical movie viewers by becoming more aware of how tobacco is used in Hollywood films and better able to see through the "smokescreen" glamorizing smoking. The Smoke Screeners program reached out to the high-risk 11-14 year olds in more than 1,000 middle schools and youth centers throughout Massachusetts.

13. Outside of the classroom, numerous MTCP activities inform youth of tobacco risks and involve them in positive peer efforts. Creative activities carried out by local programs are designed both to provide information and to engage youth in positive anti-smoking leadership activities. For example, members of MTCP-funded youth programs have sponsored or participated in over 3,200 community tobacco education and prevention events, such as public speaking engagements and recreational or cultural events. In Fiscal Year 1998 alone almost 900 events drew a total attendance of over 160,000 people.

14. The MTCP funds statewide support service programs that disseminate tobacco educational materials; raise public awareness of the health hazards associated with tobacco use and of tobacco industry activities that promote use;

educate local cities and towns about tobacco control legal and policy issues that may affect their residents; and provide easily accessible assistance to smokers and their families. These programs include a clearinghouse of educational materials, a smokers' quit counseling line, and training programs.

15. According to the Massachusetts Adult Tobacco Surveys, which were conducted under the direction and supervision of the MTCP, 63% of current adult smokers in Massachusetts started smoking before they were 18 years old, and only 12% began after age 21.

16. In 1998, the MTCP conducted a survey of the advertisements visible on more than 3,000 storefronts in Massachusetts in 125 cities and towns across the Commonwealth. The results of this statewide advertising survey were published in a report entitled "Operation Storefront." Operation Storefront found:

a. Tobacco advertising made up 52% of the more than 20,000 advertisements visible from outside retail establishments surveyed from February through April 1998;

b. The four brands which surveys by the CDC have shown are the most popular brands among youth (Marlboro, Newport, Camel, and Winston) (accounting for 93% of youth smoking), were the most heavily advertised brands visible on storefronts. These four brands accounted for more than two-thirds (68%) of all tobacco ads;

c. Stores within 1,000 feet of schools displayed more tobacco advertisements per vendor than stores farther away. The average number of tobacco advertisement was 5.49 for stores near schools, and 3.96 for other stores;

d. Stores in poorer communities and minority communities carry more cigarette advertising per store than those in more affluent and non-minority communities.

17. In or about 1991, I contacted The Tobacco Institute to request a copy of their voluntary advertising and promotion code. The document attached as Exhibit C to this affidavit is a true and accurate copy of the document I received from the Tobacco Institute, entitled "Cigarette Advertising and Promotion Code."

SIGNED AND SWORN UNDER THE PAINS AND PENALTIES OF PERJURY THIS ___ DAY OF OCTOBER, 1999.

/s/ Gregory N. Connolly
Gregory N. Connolly

Sworn before me this ___ day of October, 1999.

/s/ [illegible]
Notary Public

My Commission expires:

MY COMMISSION EXPIRES
JUNE 21, 2002

Exhibit "A"

Best Practices for Comprehensive
Tobacco Control Programs

CDC

U.S. Department of Health and Human Services
Centers for Disease Control and Prevention
National Center for Chronic Disease Prevention and Health
Promotion Office on Smoking and Health

* * * *

Efficacy of Comprehensive Tobacco Control Programs: California and Massachusetts

Evidence supporting the programmatic recommendations in this guidance document are of two types. Recommendations for chronic disease programs to reduce the burden of tobacco-related diseases, school programs, cessation programs, enforcement, and counter-marketing program elements are based primarily upon published evidence-based guidelines. Other program categories rely mainly upon the evidence of the efficacy of the large-scale and sustained efforts of two States (California and Massachusetts) that have been funding comprehensive tobacco prevention and control programs using State tobacco excise taxes. Increasing excise taxes on cigarettes reduces tobacco consumption rates. But more importantly, when the excise taxes support effective community, media, and school programs to prevent tobacco use, decreases in per capita consumption will continue even if industry lowers tobacco prices to preexcise tax values.

* * * *

Exhibit "C"

Cigarette Advertising and Promotion Code

The Tobacco Institute

Cigarette smoking is an adult custom. Children should not smoke. Laws prohibiting the sale of cigarettes to minors should be strictly enforced. The cigarette manufacturers advertise and promote their products only to adult smokers. They support the enactment and enforcement of state laws prohibiting the sale of cigarettes to persons under 18 years of age.

The cigarette manufacturers have adopted the following Code to emphasize their policy that smoking is solely for adults.

* * * *

Advertising

1. Cigarette advertising shall not appear—

   (a) in publications directed primarily to those under 21 years of age, including school, college or university media (such as athletic, theatrical or other programs), comic books or comic supplements; or

   (b) on billboards located within 500 feet of any elementary school, junior high school or high school or any children's playground.

2. No payment shall be made by any cigarette manufacturer or any agent thereof for the placement of any cigarette, cigarette package, or cigarette advertisement as a prop in any movie produced for viewing by the general public.

3. No one depicted in cigarette advertising shall be or appear to be under 25 years of age.

4. Cigarette advertising shall not suggest that smoking is essential to social prominence, distinction, success or sexual attraction, nor shall it picture a person smoking in an exaggerated manner.

5. Cigarette advertising may picture attractive, healthy looking persons provided there is no suggestion that their attractiveness and good health is due to cigarette smoking.

6. Cigarette advertising shall not depict as a smoker anyone who is or has been well known as an athlete, nor shall it show any smoker participating in, or obviously just having participated in, a physical activity requiring stamina or athletic conditioning beyond that of normal recreation.

7. No sports or celebrity testimonials shall be used or those of others who would have special appeal to persons under 21 years of age.

* * * *

Sampling

1. Persons who engage in sampling shall refuse to give a sample to any person whom they know to be under 21 years of age or who, without reasonable identification to the contrary, appears to be less than 21 years of age.

2. Sampling shall not be conducted in or on public streets, sidewalks or parks, except in places that are open only to persons to whom cigarettes lawfully may be sold.

3. Cigarette product samples shall not otherwise be distributed in any public place within two blocks of any centers of youth activities, such as playgrounds, schools, college campuses, or fraternity or sorority houses.

* * * *

Definitions

1. "Advertising" means all forms of advertising including vehicle decals, posters, pamphlets, matchbook covers and point of purchase materials in the United States, Puerto Rico, and U.S. territorial possessions.

2. "Sampling" means giving or distributing without charge packages of cigarettes in a public place for commercial advertising purposes ("cigarette samples"), but does not include isolated offerings of complimentary packages or the distribution of such packages ro wholesale or retail customers or to company shareholders or employees in the normal course of business.

[Dated October 15, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, as Attorney General, Defendant.	)	Civil Actions No. 99-11118-WGY (and consolidated cigarette cases)
UNITED STATES TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, as Attorney General, Defendant.	)	Civil Action No. 99-CV-11135-WGY
CONSOLIDATED CIGAR CORP., et al., Plaintiffs v. THOMAS REILLY, as Attorney General, Defendant.	)	Civil Action No. 99-CV-11270-WGY

ATTORNEY GENERAL'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED PURSUANT TO LOCAL RULE 56.1

* * * *

15. In January 1999, the Attorney General promulgated regulations pursuant to M.G.L. c. 93A, §2 (c) to proscribe certain unfair and deceptive acts and practices that promote the illegal sale of tobacco products to persons under 18 years of age. 940 Code Mass. Reg. § 21.00, *et seq.* and 940 Code Mass. Reg. § 22.00, *et seq.* (Copies attached). The Attorney General's regulations were originally proposed, and published in the Massachusetts Register, on May 1, 1998. Public hearings were held in Boston on May 20, 1998 and in Springfield on May 21, 1998, eliciting testimony supporting and opposing the regulations from 41 individuals and organizations. In addition, approximately 100 written comments on the proposed regulations were submitted to the Attorney General by various individuals and organizations. Affidavit of Michael G. Hering ("Hering Aff.") ¶ 94.

Support for the Attorney General's Regulations

16. In 1994, the United States Surgeon General published a report entitled Preventing Tobacco Use Among Young People: A Report of the Surgeon General. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1994. ("1994 Surgeon General Report"). That report included a chapter, at pages 157-203, which reviewed evidence relating cigarette advertising to youth smoking initiation and stated: "Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of

smoking, cigarette advertising appears to increase young people's risk of smoking." Hering Aff., Ex. 1, p. 195.

17. The 1994 Surgeon General's Report found that among all persons who had ever been daily smokers, 81.9% first tried a cigarette before age 18. Hering Aff., Ex. 1, p. 65.

18. In 1995, the Food and Drug Administration ("FDA") performed a rulemaking analysis of the evidence relating cigarette and smokeless tobacco advertising to youth smoking initiation and youth use of smokeless tobacco and issued a proposed rule: *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, Proposed Rule*. Food and Drug Administration. 60 Fed. Reg. 41,313 (1995) ("FDA Proposed Rule"). The FDA comentary that accompanied the Proposed Rule cites and discusses a large number of scientific studies and other evidence on this issue. After this review, the FDA states: "The agency concludes that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: 1) A causal relationship between advertising and youth smoking behavior, and 2) a positive effect of stringent advertising measures on smoking rates and on youth smoking. . . . Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption. Therefore, the agency finds that stringent restrictions on advertising are essential if smoking by adolescents is to be reduced." Hering Aff., Ex. 2, p. 41334.

19. The FDA received voluminous comments on the Proposed Rule from interested parties, including from the cigarette and smokeless tobacco manufacturers and/or their agents. The FDA then analyzed and discussed many of these comments in its Final Rule. 61 Fed. Reg. p. 44474-44495. The FDA concluded: "FDA's review and consideration of the comments received has led the agency to conclude that

advertising plays a material role in the decision by those under 18 to use tobacco products." Hering Aff., Ex. 3, p. 44466.

20. In 1994, the National Academy of Science's Institute of Medicine issued a report entitled Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths that reviewed the evidence relating cigarette advertising to youth smoking initiation. p. 105-139. The report stated: "Tobacco advertising is characterized by images and themes that are especially appealing to adolescents, and some are appealing to children. In addition, a large proportion of promotional expenditures associate use of tobacco with activities and products that are attractive to children and youths. The sheer amount of expenditures for advertising and promotion assures that young people will be exposed to these messages on a massive scale." The report also states, "The images typically associated with advertising and promotion convey the message that tobacco use is a desirable, socially approved, safe and healthful, and widely practiced behavior among young adults, whom children and youths want to emulate. As a result, tobacco advertising and promotion undoubtedly contribute to the multiple convergent pyschosocial influences that lead children and youths to begin using these products and to become addicted to them." Hering Aff., Ex. 4, p. 130 - 31.

21. A review study entitled "How Many Adolescents Start Smoking Each Day in the United States?" by Gilpin, Elizabeth A., et al., was published in the Journal of Adolescent Health 1999;25:248-255. The study found that nationwide 4,824 adolescents first experiment with cigarettes every day. Adolescent is defined as between 11 and 17 years old. The study also found that 1,975 under-age U.S. adolescents become regular smokers each day. The study cross-references data from the 1989 and 1993 Teenage Attitudes and Practices Surveys (TAPS) of 16,954 individuals with the 1992 and 1993

Current Population Surveys (CPS) of 82,279 individuals. Hering Aff., Ex. 93.

Outdoor Tobacco Advertising in Massachusetts

22. A study entitled "Outdoor Tobacco Advertising in Six Boston Neighborhoods. Evaluating Youth Exposure" by Pucci, et. al., was published in the *American Journal of Preventive Medicine*, 1998, 15(2). The study examined the prevalence, type and proximity to public schools of all stationary outdoor tobacco advertising in six Boston neighborhoods. The study found that "youth in the six neighborhoods are heavily exposed to stationary, outdoor cigarette advertising. This exposure is intense in areas close to public schools, and more intense in neighborhoods with more children, with significant Black and Hispanic/Latino populations, and with low socioeconomic status. . . . 32% of the advertising units [at retail establishments] were less than 3.5 feet from the ground or at children's eye level." Hering Aff., Ex. 57.

23. A study entitled "Massachusetts Operation Storefront-1998" by the Massachusetts Department of Public Health, Massachusetts Tobacco Control Program was issue din 1998. The study surveyed more than 3000 retail outlets in 125 cities and towns in Massachusetts. The study found:

a. "Tobacco advertisements made up 52% of the more than 20,000 advertisements visible to youth from outside retail establishments surveyed..."

b. "Brands smoked by youth (Marlboro, Camel, Newport, Winston) were also the most heavily advertised brands, accounting for more than two-thirds of all tobacco ads."

c. "Storefronts located within 1000 feet of a school were more likely to display more tobacco advertisements per retail vendor, and displayed more ads per vendor, than storefronts located farther away from schools. Fifty-two percent of retail

ads near schools were for tobacco, while only 48% percent away from schools were tobacco ads."

d. "The average number of tobacco advertisements was 5.49 for stores near schools, and only 3.96 for other stores -- exposing children to nearly one and a half times more tobacco displays during their daily activities." Hering Aff., Ex. 58; Affidavit of Greg Connolly ("Connolly Aff.") at. ¶ 16.

24. The voluntary advertising code published by the cigarette industry's trade group in 1990 prohibits cigarette advertising on billboards located within 500 feet of schools or playgrounds. Cigarette Advertising and Promotion Code, The Tobacco Institute, December, 1990. Connolly Aff., Ex. C.

Historical Studies

25. Historical studies have analyzed variations in the kind and amount of cigarette advertising in the past and compared these advertising variations with changes in smoking initiation among youths. Some of these studies examined specific cigarette marketing campaigns and concluded that they were associated with increased smoking behavior among young people including minors. Hering Aff., Ex. 5 - 9.

26. A study entitled "Trends in Adolescent Smoking Initiation in the United States: Is Tobacco Marketing an Influence?" by Gilpin, E., and Pierce, J., was published in *Tobacco Control*. 6(2):122-127 (1997). The study analyzes survey and other data, and states: *"Results*--From 1979 to 1984, adolescent [smoking] initiation rates decreased, but increased thereafter... Cigarette price increased throughout the decade as did tobacco marketing expenditures, especially for coupons, value-added items, and promotional allowances. *Conclusion*– Availability of cheaper cigarettes is not likely to be a cause of increased smoking initiation by adolescents. Although other influences cannot be ruled out, we suspect that the expanded tobacco marketing budget, with its increased emphasis on tactics that may be particularly pertinent to young

people, affected adolescent initiation rates." Hering Aff., Ex. 5, p.122.

27. A study entitled "A Historical Analysis of Tobacco Marketing and the Uptake of Smoking by Youth in the United States: 1890-1977" by Pierce, J., and Gilpin, E., was published in *Health Psychology*. 14(6): 500-508 (1995). The study reports the results of a series of surveys and other data, stating: "Our initiation rate trend (slope) analysis clearly show that marked increases in the rate of smoking uptake in the particular gender group targeted by these [advertising] campaigns were coincident with the beginning of each. Such an effect was not observed among the nontargeted gender" p.5. [Following a historical analysis culminating in the period ending in 1977] "Thus, it would appear that the effectiveness of tobacco marketing practices in encouraging nonsmokers to start smoking may now be limited to the adolescent population." Hering Aff., Ex. 6, p.8..

28. A study entitled "Trends in smoking initiation among adolescents and young adults -- United States, 1980-1989" by Cummings KM, Shah D, Shopland DR was published in the Centers for Disease Control, Morbidity and Mortality Weekly Report, 1995; 44:521-5. The study reports the results of survey data stating: "Among adolescents [age 14-17], the smoking initiation rate decreased slightly from 1980 (5.4%) through 1984 (4.7%) and then increased through 1989 (5.5%)... In comparison, among young adults, initiation rates declined throughout the 1980s." "The increase in rates of smoking initiation among adolescents during 1985-1989 may reflect increased real expenditures for cigarette advertising and promotion. The increase in rates occurred during a period when real expenditures for total cigarette advertising and promotion doubled, and expenditures for cigarette promotion more than quadrupled." Hering Aff., Ex. 7.

29. A study entitled "Smoking Initiation by Adolescent Girls: 1944 Through 1988: An Association With Targeted

Advertising" by Pierce, J., Lee, L., and Gilpin, E., was published in the *Journal of the American Medical Association*. 271(8): 608-611 (1994). The study reports the results of analysis of the National Health Interview Surveys and other data, stating: "Results.--In 18 to 20-year-old women, [smoking] initiation rates peaked in the early 1960s and steadily declined thereafter. In girls younger than 18 years, smoking initiation increased abruptly around 1967, when tobacco advertising aimed at selling specific brands to women was introduced...Conclusions.--The tobacco advertising campaigns targeting women, which were launched in 1967, were associated with a major increase in smoking uptake that was specific to females younger than the legal age for purchasing cigarettes." Hering Aff., Ex. 8, p. 608.

30. An article entitled "Changes in the Cigarette Brand Preferences of Adolescent Smokers--United States, 1989-1993" was published in the Centers for Disease Control, Morbidity and Mortality Weekly Report 43(32): 577-604 (19 August 1994). The article compared the results of surveys in 1989 and 1993, stating: In 1993 among adolescents aged 12-18 years, "Marlboro, Camel, and Newport were the most frequently purchased brands." p.577-79. The brand preference for Camel brand cigarette among adolescents rose from 8.1% in 1989 to 13.3% in 1993. At the same time the overall market share for Camel brand cigarettes was 3.9% in 1989 and remained at 3.9% in 1993. [The old Joe cartoon character advertising campaign for Camels began in 1988]. Hering Aff., Ex. 9, Table 2.

Studies Regarding Brand Specific Cigarette Advertising and Youth Cigarette Brand Behavior

31. A series of studies have found a correlation between the intensity of brand-specific cigarette advertising and 1) cigarette brand awareness among young children or youth; and/or 2) cigarette brand preference among youth who do not

smoke; and/or 3) cigarette brand market shares among youth who smoke. Hering Aff., Ex. 10 - 20, 40.

32. A study entitled "The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults, 1979-1993" by Pollay, Richard W., et al. was published in the *Journal of Marketing*. 60(2):1 - (1996). The study analyzed cigarette brand market share data and cigarette brand advertising expenditure data over a twenty year period. The study stated: "Because brand shares of advertising voice [expenditures] are significantly related to subsequently realized market shares, cigarette advertising appears to influence the smoking behavior of adolescents. This finding is robust to various assumptions regarding the carryover of advertising effects from period to period and accounting for the possibility that the behavior of adolescents is an imitation of adults who have been influenced by advertising. Notably, the effect is substantially larger among adolescents than among adults by a factor of about three. The battle of the brands for market share is waged largely among the young, for it is a brand's success among the young that leads to greater brand sales and profit in the long term." Hering Aff., Ex. 10.

33. A study entitled "Exposure to Brand-Specific Cigarette Advertising in Magazines and its Impact on Youth Smoking," by Pucci, Linda G. et al., will be published in *Preventive Medicine*. The study conducted "[a] longitudinal youth survey...to assess baseline exposure to brand-specific cigarette advertising in magazines and to measure subsequent smoking behavior. The sample comprised of 1,069 Massachusetts youths, ages 12-15 years at baseline in 1993, and 627 of these youths who were interviewed after four years." The study concluded that [b]y documenting a relationship between brand-specific magazine advertising exposure and brand of smoking initiation among new smokers, this study provides strong new evidence that cigarette advertising influences youth smoking." Hering Aff. Ex. 40.

34. A study entitled "*Adolescents' responses to cigarette advertisements: links between exposure, liking, and the appeal of smoking*," by Arnett, J. was published in *Tobacco Control* 1998; 7:129-133. The study reported the results of a survey of 534 adolescents in grades 6-12 (ages 11-18) from seven schools in four states which examined adolescents' responses to cigarette advertisements for different brands The study concluded that "[t]he advertisements most popular among adolescents are for two of the brands they are most likely to smoke--Marlboro and Camel. The results of the study are consistant with the view that certain cigarette advertisements enhance the appeal of smoking to many adolescents." Hering Aff., Ex. 11.

35. A study entitled "Cigarette Advertising and Children's Smoking: Why Reg was Withdrawn" by Hasings, G.B., et al. was published in the *British Medical Journal*. 309: 933-937 (1994). The study reported the results of a survey of British children and adults. The study concluded that the "[advertising campaign for a British cigarette brand Regal] was getting through to children more effectively than it was to adults and held the most appeal for teenagers, particularly 14-15 year old smokers." Hering Aff., Ex. 12, p. 933

36. A study entitled "Does Tobacco Advertising Target Young People to Start Smoking?: Evidence From California" by Pierce, John P., et al. was published in the *Journal of the American Medical Association*. 266(22):3154-3158 (1991). The study reported the results of telephone surveys of 24,296 adults and 5,040 teenagers. The study stated: "Perception of [cigarette] advertising is higher among young smokers; market-share patterns across age and sex groups follow the perceived advertising patterns; and changes in market share resulting from advertising occur mainly in younger smokers. Cigarette advertising encourages youth to smoke..." Hering Aff., Ex. 13.

37. A study entitled "*Brand Logo Recognition by Children Aged 3 to 6 Years*," by Fischer, P. et al., was published in the Journal of the American Medical Association, December 11, 1991, vol 266, No. 22. The study reported the results of a survey of 229 children aged 3 to 6 years, attending preschool, which examined product logo recognition. The study found that "[t]he recognition rates of The Disney Channel logo [i.e. Micky Mouse] and Old Joe (the cartoon character promoting Camel cigarettes) were highest in their respective product categories. Recognition rates increased with age. Approximately 30% of 3-year old children correctly matched Old Joe with a picture of a cigarette compared with 91.3% of 6-year-old children." The study concluded that "[v]ery young children see, understand and remember advertising." Hering Aff., Ex. 14.

38. A study entitled "RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children" by DiFranza, Joseph R., et al., was published in the *Journal of the American Medical Association*. 266(22):3149-3153 (1991). The study reported the results of surveys of high school students and adults. The study investigated recognition of Camel's Old Joe cartoon character, product and brand name recall in masked advertising samples, brand preference, and appeal of advertising themes. In comparing high school students grades 9 - 12, to adults age 21 years or older, the study stated: "Children were more likely to report prior exposure to [R.J. Reynolds' Camel brand] Old Joe cartoon character (97.7% vs 72.2%...). Children were better able to identify the type of product being advertising (97.5% vs 67.0%...) and the Camel cigarette brand name (93.6% vs 57.5%...). Children also found the Camel cigarette advertisements more appealing...This confirms that Old Joe cartoon character advertisements are more effective at communicating product and brand name information to children than to adults." "Our data demonstrate that in just 3 years [since the start of the advertising campaign in 1988] Camel's Old Joe cartoon

character had an astounding influence on children's smoking behavior. The proportion of smokers under 18 years of age who choose Camels has risen from 0.5% to 32.8%." Hering Aff., Ex. 15. p. 3151.

39. A study entitled "Reinforcing Effects of Cigarette Advertising on Under-age Smoking" by Aitken, P.P. and D.R. Eadie was published in the *British Journal of Addiction*. 85: 399-412 (1990). The study reported the results of interviews with 848 Glasgow children aged between 11 and 14 years. The study stated: "There were consistent differences between smokers and non-smokers. Smokers tended to be more adept at recalling, recognizing and identifying cigarette advertisements. This suggests that they pay more attention to cigarette advertising. Smokers also tended to be more appreciative of cigarette advertising. Moreover, this greater awareness and appreciation of cigarette advertising was independent of other important predictors of under-age smoking, such as smoking by peers, siblings and parents. These findings, taken in conjunction with previous research, indicate that cigarette advertising is reinforcing under-age smoking." Hering Aff., Ex. 16, p. 399.

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42. A study entitled "Brand preferences among children who smoke" by McNeill AD, Jarvis JM, West RJ was published in the British Medical Journal *Lancet*. 1985;2:271-2. The study reported the results of a survey in England. It found that among students age 11 - 16 years, 91% of those that smoke had a brand preference, and 80% preferred the most heavily advertised brand, Benson & Hedges. The study stated "It would be surprising if it were by chance alone that the most heavily promoted cigarette brand in Britain was also the brand most preferred by children." Hering Aff., Ex. 19, p.272.

43. A study entitled "Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications

for Health Promotion" by Chapman, Simon and Fitzgerald, was published in the *American Journal of Public Health*. 72(5):491-494 (1982). The study stated: "A survey on brand preference and cigarette advertising recall in 1,195 school children was conducted in Sydney, Australia. Four of the 130 available brands accounted for the cigarettes smoked by 78.7 per cent of smokers. Smokers were nearly twice as likely to correctly identify edited [masked] cigarette advertisements and slogans than were non-smokers." Hering Aff., Ex. 20, p. 491.

Studies Regarding Youth Exposure to Cigarette Advertising (all brands) and Youth Smoking Behavior

44. A large number of cross-sectional studies find a correlation between youth exposure to cigarette advertising (and promotion) and increased youth smoking or steps towards smoking. These studies find associations between exposure to, or participation in, cigarette advertising and promotional activities, and positive attitudes toward smoking, susceptibility to smoking, smoking experimentation, and regular smoking among youths. The relationships found in these studies persisted even when other factors which have been shown to predict smoking initiation were controlled for (such as family and peer influence). Hering Aff., Ex. 21 - 29, 32 - 38, 55 - 59, 90.

45. A study entitled "Effects of Sales Promotion on Smoking among U.S. Ninth Graders," by Redmond, W., was published in *Preventive Medicine* 28:243-250 (1999). The study reported the results of analysis of annual surveys of high school seniors from 1978 through 1995 (total of 94,652 participants) and data on smoking initiation rates and cigarette marketing expenditures. The study "examine[d] the association between tobacco marketing efforts and daily cigarette smoking by adolescents." The study concluded that "[p]rior research has established that cigarette sales promotions are attractive to adolescents and that receptivity to promotional items by adolescents is associated with progression toward smoking

behavior. The present research establishes a linkage between cigarette promotions and escalated levels of smoking behavior among adolescents. Significantly greater numbers of ninth graders initiate daily smoking in years of high promotional expenditures than would otherwise be expected." Hering Aff., Ex. 21.

* * * *

47. A study entitled "Tobacco advertisements: one of the strongest risk factors for smoking in Hong King students" by Lam TH, Chung SF, Betson CL, Wong CM, Hedley AJ. was published in the *American Journal of Preventive Medicine* 1998; 14:217-23. The study of 6,304 randomly selected secondary school students in Honk Kong found that "In a backward stepwise logistical regression model, ever-smoking was independently associated with thirteen factors...Among the strongest associations observed was the youth's perception of cigarette advertisements as attractive." Hering Aff., Ex. 23

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49. A study entitled "Cigarette Promotional Items in Public Schools" by Sargent, James D. et al. was published in the *Arch. Pediatr. Adolesc. Med.* 151: 1189-1196 (1997). The study reported the results of a survey of 1265 sixth through twelfth graders in Vermont. The study found that one-third of the students surveyed owned a cigarette promotional item. The study stated: "After controlling for confounding factors, such as having friends who smoke, students who owned [cigarette promotional items] were 4.1 times more likely to be smokers than those who did not own." Hering Aff., Ex. 25, p.1189.

50. A study entitled "Tobacco Promotion and Susceptibility to Tobacco Use Among Adolescents Aged 12 through 17 Years in a Nationally Representative Sample" by Altman, David G., et al., was published in the *American Journal of Public Health*. 86:1590-1593 (1996). The study

reported the results of a survey of 1047 adolescents 12 - 17 years old and also from a survey of young adults 18 - 24 years old. The study found: "Our data provide evidence that experience with tobacco promotion, as measured by awareness, knowledge of others owning items, and firsthand experience with promotions, is strongly associated with susceptibility to tobacco use. This finding is important because there is evidence of a dose-response relationship between the susceptibility index and subsequent tobacco use and other evidence that youth are highly involved in tobacco promotion campaigns." Hering Aff., Ex. 26.

51. A study entitled "Seventh Graders' Self-Reported Exposure to Cigarette Marketing and Its Relationship to Their Smoking Behavior" by Schooler, C., Feighery, E., and Flora, J., was published in the *American Journal of Public Health*. 86(9): 1216-1221 (1996). The study reported the results of a survey of 571 seventh graders. The study stated: "Eighty-eight percent of these 13-year olds reported exposure to cigarette marketing: the majority often saw ads in magazines, on billboards, and at stores and events, and one quarter owned cigarette promotional items. After social influences to smoke were controlled for, exposure to cigarette marketing was related to self-reported smoking behavior. Likelihood of experimenting with smoking was 2.2 times greater among those who owned promotional items and 2.8 times greater among those who had received mail from a tobacco company. Seeing cigarette advertisements in magazines increased the likelihood by 21% and seeing tobacco marketing in stores increased it by 38%." "Conclusions. Youth are daily and widely exposed to tobacco industry marketing efforts; this exposure is related to smoking behavior." Hering Aff., Ex. 27, p. 1216.

52. A study entitled "Recognition and Liking of Tobacco and Alcohol Advertisements Among Adolescents: Relationships with Susceptibility to Substance Abuse" by

Unger, Jennifer B., C. Anderson Johnson, and Louise A. Rohrbach was published in *Preventive Medicine*. 24(5): 461-466 (1995). The study divided eighth-grade students into groups based on their smoking status. The students were then asked to view masked cigarette advertisements. The study reported: "The results of this study indicated that susceptible nonsmoking adolescents are similar to current cigarette smokers in their reactions to cigarette advertisements. Cigarette advertisements appealed just as much to susceptible nonsmoking youth as to smokers... One interpretation of these findings is that cigarette advertisements ostensibly aimed at encouraging current smokers to switch brands rather than recruiting new smokers are in fact attracting susceptible nonsmokers as well as current smokers." Hering Aff., Ex. 28, p. 465.

53. A study entitled "Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking" Evans, Nicola, et al. was published in the *Journal of the National Cancer Institute*. 87(20): 1538-1545 (1995). The study reported the results of a survey of 3,536 adolescents [12-17 years old] who had never smoked. The study found: "Receptivity to tobacco advertising and exposure to smokers were independently associated with susceptibility to smoking, but the relationship appeared stronger for receptivity to advertising. Adolescents exposed to family members and peers...who smoked were 1.89 (95% confidence interval...) times as likely to be susceptible [to smoking], whereas adolescents who scored 4 or more on the Index of Receptivity to Tobacco Marketing [recognition of cigarette advertising messages, having a favorite cigarette advertisement, owning or willingness to use a promotional item, and other factors] were 3.91...times as likely to be susceptible [to smoking] as those who scored 0. Even adolescents who scored 2...were 2.03 times as likely to be susceptible...Conclusion: Our results support the hypothesis that tobacco marketing may be a stronger current influence in encouraging adolescents to initiate

the smoking uptake process than exposure to peer or family smokers or sociodemographic variables including perceived school performance." Hering Aff., Ex. 29, p. 1538.

54. A study entitled "Smoking Behavior of Adolescents Exposed to Cigarette Advertising" by Botvin, Gilbert J., et al. was published in *Public Health Reports*. 108(2) 217-224 (1993). The study reported the results of a survey of 602 adolescents which assessed the children's exposure to cigarette advertising and provided measures of their smoking behavior, demographic characteristics and some psychosocial variables. The study stated: "[e]xposure to cigarette advertising was found to be correlated with several measures of adolescent smoking behavior and it was found to be an important concurrent predictor of current smoking and intention to smoke in the future." Hering Aff., Ex. 32.

55. A Report entitled "Teen-age attitudes and behavior concerning tobacco" by the George H. Gallup International Institute was issued in 1992. The report presents the findings of a nationwide telephone survey of 1,125 teen-agers. The report states: "Tobacco advertising clearly is reaching teen-agers. Half could identify by sponsor at least one of four tested slogans. 87 percent of the teens interviewed could recall one or more tobacco company's advertising they had recently seen." Hering Aff., Ex. 33.

56. A study entitled "Cigarette Advertising and Adolescent Experimentation with Smoking" by Klitzner, Michael, Paul J. Gruenewald, and Elizabeth Bamberger was published in the *British Journal of Addiction*. 86: 287-298 (1991). The study reported the results of a survey of 295 United States 5th through 12th graders which examined relationships between cigarette advertising and smoking experimentation using environmental and psychological measures of advertising exposure. The study stated: "it was demonstrated that adolescents who experimented with cigarettes were better able to recognize advertised products

than those who had not, a selective exposure effect. Conversely, subjects who were better at recognizing advertised brands were more likely to have experimented with cigarettes, an effect due to their exposure to cigarette advertising." Hering Aff., Ex. 34.

57. A study entitled "Children's Awareness of Cigarette Advertisements and Brand Imagery" by Aitken, P.P., et al. was published in the *British Journal of Addiction*. 82: 615-622 (1987). The study reported the results of interviews of 726 Glasgow children aged between 6 and 17. The study states: "Their responses to questions about a set of cigarette advertisements indicate that the majority of primary school children are well aware of cigarette advertising; and many can correctly identify cigarette brands in 'puzzle' advertisements which do not show brand names." "Among the secondary school children, proportionally more smokers than non-smokers said they had seen the advertisements; and proportionally more smokers identified the puzzle advertisements. These findings suggest that cigarette advertising is getting through to young people and to under-age smokers in particular." Hering Aff., Ex. 35

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59. A study entitled "Children's advertisement-awareness related to their views on smoking" by Charlton A., was published in the *Health Education Journal* 1986;45:75-8. The study reported the results of a survey of 849 children aged nine and ten years, and 1,132 children aged 12 and 13 years. The study found: "67 per cent of the younger group and 84 per cent of the older group could name at least one cigarette brand. Seventeen per cent of the younger and 23 per cent of the older group named a favorite cigarette advertisement...Those children who named a favorite advertisement showed significantly greater support for supposed positive values of smoking such as looking tough, looking grown-up, calming nerves, giving confidence and controlling weight. This

difference in opinion applied equally to smokers and 'never smokers' in both age groups." Hering Aff., Ex. 36, p. 75.

60. A study entitled "Adolescent smoking and opinion of cigarette advertisements" by Potts H, Gillies P, Herbert M., was published in *Health Education Research* 1986; 1:195-201. The study reported the results of a survey of 258, 15-16 year olds, which asked the students about their smoking behavior and opinion of cigarette advertisements. The study stated: "More regular smokers than non-smokers held the view that the cigarette advertisements used in this study were exciting, interesting, eye-catching, glamorous and witty. A favorable opinion of advertisements was found to be significantly associated with adolescents' smoking. These findings provide some evidence to support the suggestion that cigarette advertisements may maintain smoking in adolescents by reinforcing a favorable attitude towards smoking" Hering Aff., Ex. 37.

61. A study entitled "Cigarette Smoking and Drug Use in Schoolchildren: II. Factors Associated with Smoking" by O'Connell, D.L., et al., was published in the *International Journal of Epidemiology*. 10:223-231 (1981). The study reported the results of a 1979 survey of over 6000 children aged 10-12 years which assessed the prevalence of smoking in children and identified "some of the social and personal factors associated with this phenomenon." The study stated: Although "friends" smoking behavior was the best predictor of a child's smoking status, it was followed by "approval of advertising." The study concluded that "intervention in the field of cigarette advertising may be the most direct and effective means of reducing prevalence of smoking in children." Hering Aff., Ex. 38.

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64. Richard W. Pollay, Professor of Marketing, University of British Columbia (UBC) and Curator of the

History of the Advertising Archives including the Tobacco Industry Promotion Series (TIPS) submitted a paper entitled "Protecting Children as Consumers: Comments on Proposed Regulations re: packaging, marketing, distribution and sales of cigarettes, etc." in support of the Attorney General's proposed regulations. Professor Pollay concluded that "[r]educing the frequency and/or likelihood of the exposure of minor to cigarette promotions, particularly by measures restricting outdoor and point-of-sale advertising proximal to schools and routes students travel and measures restricting "free gifts" and other promotional inducements such as coupon redemptions will reduce the creation of "friendly familiarity" and other favorable perceptions of children toward cigarette brands and cigarettes as a product class. In my opinion, it is also constructive to reduce the ease and likelihood of access of children to cigarettes and tobacco products by limiting sampling activities sales of "singles," vending machines and other self-service displays." Hering Aff., Ex 59.

Longitudinal Studies Regarding Youth Exposure to Tobacco Advertising and Youth Smoking Behavior

65. Several longitudinal studies have concluded that nonsmoking youths who either approved of cigarette advertising or reported that cigarette advertisements made smoking appear attractive to them were significantly more likely to start smoking than youths who had more negative responses to cigarette advertising at baseline. Other longitudinal studies have found that youths who are responsive to cigarette advertising or participate in tobacco promotions are more likely to experiment with smoking or to progress to established smoking. Hering Aff., Ex. 39, 41 - 44.

66. A study entitled "Tobacco Marketing and Adolescent Smoking: More Support for a Causal Inference," by Biener, Lois et al., will be published in the *American Journal of Public Health*. The study reports the results of a survey of 529 nonsmoking adolescents who were interviewed

by telephone in 1993 and again in 1997. The study concludes that "[p]articipation in tobacco marketing often precedes, and is likely to facilitate progression to established smoking among adolescents. Hence, restrictions on tobacco marketing and promotion could result in reducing addiction to tobacco." Hering Aff. Ex. 39.

67. A study entitled "Tobacco Industry Promotion of Cigarettes and Adolescent Smoking" by Pierce, John P., et al., was published in the *Journal of the American Medical Association*. 279(7): 511-515 (1998). The study reported the results of an initial survey of adolescents in 1993 and follow up survey in 1996. The study reinterviewed 1,752 adolescents in 1996 who had been categorized as "never smokers who were not susceptible to smoking" when first interviewed in 1993 to evaluate the association between receptivity to tobacco advertising and promotional activities and progress in the smoking uptake process. The study states: "While having a favorite advertisement in 1993 predicted which adolescents would progress [in the smoking uptake process] by 1996, possession or willingness to use a promotional item was even more strongly associated with future progression. From these data, we estimate that 34% of all experimentation in California between 1993 and 1996 can be attributed to tobacco promotional activities. Nationally, this would be over 700,000 adolescents each year." Hering Aff., Ex. 41.

68. A study entitled "Predisposing Effects of Cigarette Advertising on Children's Intention to Smoke When Older" by Aitken, P.P., edt al., was published in the *British Journal of Addiction*. 86:383-390 (1991). The study reported the results of a survey of 640 Glasgow children, initially aged between 11 and 14 years, who were interviewed twice, with approximately one year between interviews. The study stated: "Children whose intentions to smoke when older became more positive between the two interviews tended to be more aware of cigarette advertising at the time of the first interview

(compared with children whose intentions to smoke were negative at both interviews). Children whose intentions to smoke became more negative between the interviews tended to be less appreciative of cigarette advertisements at the time of the first interview (compared with children whose intentions to smoke were positive at both interviews). Since both groups differed from their respective contrast groups before their declared intentions changed, these findings support the view that cigarette advertising has predisposing as well as reinforcing effects on children's attitudes and behaviour with respect to smoking." Hering Aff., Ex. 42, p. 383.

69. A study entitled "Influence of education and advertising on the uptake of smoking by children" by Armstrong BK, deKlerk NH, Shean RE, Dunn DA, and Dolin PJ was published in the *Medical Journal of Australia* 1990;152: 117-24. The study reported the results of an initial survey of 2366 Australian students in their 7th year of school (average age 12) with two years of follow-up surveys. The study states: "[t]he children's perceived responses to cigarette advertising showed the strongest and most consistent evidence of an effect on the uptake of smoking by children who initially were non-smokers." Hering Aff., Ex. 43.

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Studies Regarding Cigarette Advertising Restrictions in Other Countries

71. Studies of smoking rates in countries with and without significant cigarette advertising restrictions have generally found small, but significant reductions in both overall smoking rates, and in youth smoking rates, following these advertising restrictions. Hering Aff., Ex. 3, 45 - 46, 89.

72. A review study entitled "Tobacco Advertising: Economic Theory and International evidence" by Saffer, Henry et al., was published in *NBER Working Paper Series*. The paper analyzed 31 studies that looked at the effects of

advertising on cigarette consumption, conducted between 1925 and 1990. The authors concluded that "[t]he primary conclusion of this research is that tobacco advertising increases tobacco consumption." Hering Aff., Ex. 89.

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74. A report entitled "Health or Tobacco--An End to Tobacco Advertising and Promotion," by the Toxic Substances Board, Wellington, New Zealand was issued in May 1989. The report reviewed the effect of advertising restrictions in 33 countries and concluded that there was a correlation between the degree of restrictions imposed in each country and decline in tobacco use. The report stated: "When countries were grouped according to the degree of governmental restriction of tobacco promotion, the greater the degree of restriction, the greater the average annual fall in tobacco consumption. This was also true for the rate of decrease in the percentage of adults and young people who smoke." Hering Aff., Ex. 46, p. 64.

75. The FDA analyzed the academic research on the effect of restrictions on tobacco advertising in other countries. Proposed Rule, Fed. Reg. 41333-34; FDA Final Rule, Fed. Reg. 44490-44493. The FDA then stated: "Based on the foregoing, FDA finds that the international experience provides empirical evidence that restrictions on tobacco advertising, when given appropriate scope and when fully implemented, will reduce cigarette and smokeless tobacco use among children and adolescents under the age of 18." FDA Final Rule, Fed. Reg. 44493. Hering Aff., Ex. 3.

Pervasiveness of Tobacco Advertising and Adolescent Themes.

76. A review article entitled "Time to Up the Ante in the War on Smoking" by Bonnie, R.J., and B.S. Lynch was published in *Issues in Science and Technology*. 11:33-37 (1994). The article states: "[t]he ubiquitous display of messages promoting tobacco use clearly fosters an environment

in which experimentation by youth is expected if not explicitly encouraged." Hering Aff., Ex. 47, p. 34.

77. In its commentary to the Proposed Rule, the FDA quotes a former Marlboro marketer who describes the effect of Marlboro marketing as creating "friendly familiarity." Leo Burnett, cited in FDA Proposed Rule at p. 41329, fn 104. Hering Aff., Ex. 2.

78. The Federal Trade Commission Report to Congress for 1997, Pursuant to the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1337, issued in 1999, states that in 1997 the cigarette industry spent a total of $5.66 billion on advertising and promotion. The report states that this was a 10.8% increase from 1996 and compares to $361 million spent in 1970. Spending has increased annually since 1987, except for a $1.2 Billion decrease from 1993 to 1994. In 1997 the cigarette industry spent $305.4 million on point of sale advertising, a significant increase from $252.6 million in 1996. Outdoor advertising increased from $292.3 million to $295.3 million in the same period. Hering Aff., Ex. 65.

79. At study entitled "Is the Smoking Decision an 'Informed Choice'?" by Leventhal, Glynn and Fleming was published in the *Journal of the American Medical Association*, 257 (June 26, 1987) 3373-76. The study reports the result of a survey of students in grades 2-12. The study states: "The respondents greatly overestimated the prevalence of adult and peer smoking, negative attitudes of their peers were greatly underestimated. . . ." Hering Aff., Ex. 49.

80. A study entitled "Predicting the Onset of Cigarette Smoking in Adolescents: A Longitudinal Study" by Chassin, L., et al. was published in the *Journal of Applied Social Psychology*. 14:224-243 (1984). The study reports the results of surveys of 6-11th graders, and of a follow up survey one year later. The study found that the degree of youth overestimation of smoking prevalence among adults and

teenagers is one of the strongest predictors of smoking initiation. Hering Aff., Ex. 48.

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82. A study entitled "Cigarette Brand Preferences Among Adolescents," by Johnston, Lloyd D. et al., was published *Monitoring the Future Occasional Paper 45*. The study analyzed "brand preference" among "2,048 eigth graders, 2,708 tenth graders, and 2,335 twelfth graders" and concluded that "the very high rates of cigarette smoking found among American teenagers in the late 1990s are associated with the popularity of just three brands: Marlboro . . . Newport . . . and Camel . . . these have been among the most heavily advertised and promoted cigarette brands[.]" Hering Aff., Ex. 91.

83. A study entitled "Changes in the Cigarette Brand Preferences of Adolescent Smokers--United States, 1989-1993" was published in the Centers for Disease Control, Morbidity And Mortality Weekly Report, 43(32): 577-604 (19 Aug. 1994). The study finds that the three most heavily advertised brands, Marlboro, Camel and Newport, have been the three most popular with adolescents. Hering Aff., Ex. 9.

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Smokeless Tobacco

90. A three year population based telephone survey conducted in 1990, 1992, and 1993 entitled "Does advertising promote smokeless tobacco use among adolescent boys? Evidence from California," by Won S. Choi et al., was published in *Tobacco Control* 1995; 4 (Suppl 1): S57-S63). The California survey included (n = 3912 in 1990, 883 in 1992 and 2814 in 1993) adolescent boys aged 12 to 17 years and men between the ages of 18 and 24. The study concluded that "[d]espite the large scale California Tobacco Control Program, adolescent use and susceptibility to use smokeless tobacco remained unchanged from 1990 to 1993." While "[e]xposure

to other smokeless tobacco users was the largest predictor of both current use and susceptibility to use smokeless tobacco[,]. . . peer approval and exposure to tobacco advertising were also both significant predictors for use and susceptibility." Hering Aff., Ex. 64.

* * * *

Cigars

93. Advertising expenditures of the cigar industry have increased dramatically in recent years, as has cigar consumption, including among youth. Report of the Federal Trade Commission to Congress, *Cigar Sales and Advertising and Promotional Expenses for Calendar Years 1996 and 1997* (1999). Hering Aff., Ex. 71; *NCI Monograph No. 9, Cigars: Health Effects and Trends*, Chapter 7. Hering Aff., Ex. 67.

94. The Federal Trade Commission has found that cigar industry advertising and promotional expenditures increased by 32% over a two-year period (1996-1997), "with large spending increases on point of sale advertising and public entertainment events." Point of sale advertising increased almost 37% from 1996 to 1997. "By far, the industry's largest expenditures in 1996 and 1997 were on promotional allowances--that is, discounts and other incentives given to retailers to encourage cigar sales." Report of the Federal Trade Commission to Congress, *Cigar Sales and Advertising and Promotional Expenses for Calendar Years 1996 and 1997* (1999). Hering Aff., Ex. 71, pp. 2, 4, 5.

95. In the same period of the substantial increase in advertising expenditures, aggregate unit sales of the five largest cigar manufacturers increased from 3.8 billion cigars to 4.4 billion cigars, of 15% from 1996 to 1997. In the period from 1993 to 1998, cigar consumption increased by 57%, with the greatest increase in cigar smoking prevalence occurring among young adult men. *Id.* at 3, 8.

96. Approximately 27% of fourteen to nineteen year olds had smoked at least one cigar in the previous year, and 3% of adolescents had smoked more than 50 cigars in the previous year. *Id.* at 9.

97. A substantial number of adolescents in Massachusetts obtain and smoke cigars. *Cigar Smoking Among Teenagers--United States, Massachusetts, and New York, 1996* MMWR Report, May 23, 1997, Hering Aff., Ex. 72; *Testimony of Dr. Michael Cummings*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 73; *Testimony of Dr. Lois Biener*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 74; *Testimony of Dr. Stephen Soldz*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 75; *Five City Tobacco Control Collaborative*, Compliance Check, January 1998 (minor purchases of cigar at pharmacies, convenience stores, and smoke shops), Hering Aff., Ex. 76; *Testimony of Eileen Sullivan, Five City Tobacco Control Collaborative*, Department of Public Health Public Hearing on Declaring Cigars Hazardous Substances, May 21, 1998, Hering Aff., Ex. 77. *See, also,* DiFranza, et al., *A Comparison of the Advertising and Accessibility of Cigars, Cigarettes, Chewing Tobacco and Loose Tobacco,* submitted for publication, 1999; *Cigars: Health Effects and Trends.* Hering Aff., Ex. 61.

98. According to one focus group study, 63% of teens participating in the study recalled seeing cigar advertising, including in magazines, billboards, and novelty apparel. *Youth Use of Cigars: Patterns of Use and Perceptions of Risk,* Office of Inspector General, Department of Health and Human Services, February, 1999. Hering Aff., Ex. 78.

* * * *

Tobacco Control and Education Efforts in Massachusetts

100. The Massachusetts Tobacco Control Program ("MTCP") was established in 1993. The MTCP seeks to reduce the public health risks of tobacco use. A comprehensive set of statewide and local MTCP activities informs Massachusetts residents about tobacco risks, provides cessation services to smokers, and promotes public policies that reduce youth access to tobacco products and limit public exposure to environmental tobacco smoke. Connolly Aff., ¶¶ 1-16.

101. In fiscal year 1998, approximately $21 million of the Massachusetts Health Protection Fund was distributed to Massachusetts school districts to support comprehensive health education, including education on tobacco prevention and smoking cessation. The amount of each grant is based on the student population of each school district, with approximately $24 allocated for each child. Affidavit of Nancy Coville ("Coville Aff.") ¶ 2.

102. All Massachusetts school districts now have tobacco-free school policies. Coville Aff., ¶ 4.

103. 95% of health educators are now teaching tobacco use prevention, with the greatest emphasis being placed on middle school students. Coville Aff., ¶ 4.

104. Over half of school districts provide tobacco education to parents, and three-quarters have tobacco control programs linked to community programs. Coville Aff., ¶ 4.

105. Members of MTCP-funded youth programs have sponsored or participated in over 3,200 community tobacco education and prevention events, such as public speaking engagements and recreational or cultural events. In fiscal year 1998, almost 900 MTCP-funded events drew a total attendance of over 160,000 people. Connolly Aff., ¶ 13.

106. For each of the following fiscal years, the MTCP budget was:

a. 1995: $43.1 million;

b. 1996: $41.8 million;

c. 1997: $36.8 million;

d. 1998: $36.8 million; and

e. the budget for fiscal year 1999 is $36.9 million. Connolly Aff., ¶ 3.

107. For each of the following fiscal years the MTCP media campaign budget was:

a. 1994: $16 million

b. 1995: $14 million

c. 1996: $13 million

d. 1997: $11.70 million

e. 1998: $11.21 million; and

f. the MTCP media campaign budget for fiscal year 1999 is $11 million. Connolly Aff., ¶ 5.

108. Massachusetts' fiscal year 1996 budget for tobacco control activities funded by the Department of Public Health and the Department of Education was $65 million, or $10.60 per capita. Connolly Aff., Ex. A, p. 85.

Youth Tobacco Use

109. The Massachusetts Department of Education conducted Youth Risk Behavior Surveys in 1993, 1995 and 1997. Affidavit of Carol Goodenow ("Goodenow Aff."), ¶¶ 2 and 5.

110. In 1997, the Massachusetts Youth Risk Behavior Survey (MYRBS) found that 34.4% of Massachusetts High

School students (grades 9-12) were recent cigarette smokers (smoked cigarettes at least once in the last 30 days). This is a slight decrease from the 1995 MYRBS survey results, which found recent cigarette use to be 35.7% among high school students, but still higher than the 1993 MYRBS survey results, which found recent cigarette smoking to be 30.2% among high school students. Goodenow Aff., Ex. C, p. 7.

111. In 1997, the Massachusetts Youth Risk Behavior Survey found that 6.0% of Massachusetts High School students (grades 9-12) were recent users of smokeless tobacco (used smokeless tobacco at least once in the last 30 days). This is a decrease from the 1995 MYRBS survey results, which found recent smokeless tobacco use to be 8.4% among high school students, and a decrease from the 1993 MYRBS survey results, which found recent smokeless tobacco use to be 9.4% among high school students. Goodenow Aff., Ex. C, p. 7.

112. The Massachusetts Department of Public Health study "Adolescent Tobacco Use in Massachusetts: Trends Among Public School Students 1984-1996" found that 14.5% of Massachusetts high school students (grades 9-12) were current users of cigars (smoked cigars at least once in the last 30 days), and 38.9% of Massachusetts high school students were lifetime users of cigars (smoked cigars at least once in their lifetime). Hering Aff., Ex. 50, p. 5 and Table 4.

113. In 1995, rates of recent cigarette smoking (smoked cigarettes at least once in the last 30 days) among Massachusetts high school students, as reported by the Massachusetts Youth Risk Behavior Survey (MYRBS), were slightly above those reported by the National Youth Risk Behavior Survey (35.7% vs. 34.8%). Due to slight increases nationally and slight decreases in Massachusetts, the rates of recent cigarette smoking in the 1997 MYRBS among Massachusetts high school students dropped below national rates (34.4% vs. 36.4%). Goodenow Aff., Ex. C, p. 8.

114. The 1997 Massachusetts Youth Risk Behavior Survey found that 69% of Massachusetts High School students have tried smoking cigarettes, at least one or two puffs (lifetime smoking). Goodenow Aff., Ex. C, p. 6.

115. The 1997 Massachusetts Youth Risk Behavior Survey found that 24% of Massachusetts High School students smoked a whole cigarette for the first time before they were age 13. This rate has remained virtually unchanged since the 1993 Massachusetts Youth Risk Behavior Survey. Goodenow Aff., Ex. C, pp. 7, 9.

116. The 1997 Massachusetts Youth Risk Behavior Survey found that 26% of students who had smoked in the past month and who were age 17 or younger reported that they usually got their cigarettes by buying them in a store. Goodenow Aff., Ex. C, p. 10.

117. The 1997 Massachusetts Youth Risk Behavior Survey found that Massachusetts high school students were significantly more likely in 1997 than in 1995 to be asked for proof of age if they tried to buy cigarettes in a store: 61% were asked for proof of age in 1997, compared to only 49% who were asked in 1995. Goodenow Aff., Ex. C, p. 10.

118. 63% of current Massachusetts adult smokers started smoking before they were 18 years old. Only 12% began after age 21. Connolly Aff., ¶ 15.

* * * *

120. The 1998 MTCP media campaign carried a number of new advertisements targeted towards youth. In addition to information on health risks, they presented messages to counter some of the beliefs that make tobacco use acceptable or desirable among young people. For example, one series of ads emphasized that young people can quickly become addicted to nicotine, while another countered the idea that smoking makes one socially attractive. Connolly Aff., ¶ 5.

Tobacco Control and Retailer Compliance Checks (non AG)

121. 177 Massachusetts cities and towns, accounting for more than three-quarters of the population of the Commonwealth, now require merchants who sell tobacco products to be licensed. Connolly Aff., ¶ 10.

122. Limits on free-standing displays of tobacco products are in effect in communities that contain more than two-thirds of Massachusetts residents. 87 Massachusetts towns have completely banned vending machines, 75 require lockout devices, and 56 limit vending machines to locations that are not accessible to youth. Connolly Aff., ¶ 5.

123. The average rate of non-compliance with M.G.L. c. 270, § 6 (forbidding sale or distribution of tobacco to minors) for both MTCP-funded and non-funded communities in Massachusetts in 1998 was 19.3%, as measured by the protocol for the Massachusetts Statewide Compliance Survey. Connolly Aff. ¶ 10; Affidavit of Sarah Coelho ("Coelho Aff."), Ex. A, Attachment # 6f, p. 3.

124. About 80% of MTCP-funded Boards of Health programs performed over 8,000 tobacco control ordinance enforcement activities during Federal Fiscal year 1996. The average rate of non-compliance with M.G.L. c. 270, § 6 (forbidding sale or distribution of tobacco to minors) among funded programs has gone from an average of 70% in early 1994 to under 10% in mid-1997. Coelho Aff., Ex. A, Attachment # 6f, p. 3.

125. During the period from October 1, 1997 through September 30, 1998, 950 citations for illegal sales of tobacco from local tobacco control programs resulted in $48,238 in fines. Coelho Aff., Ex. A, Attachment # 6a, p. 1.

126. 5.7 million of the 6 million residents of Massachusetts reside in cities or towns that receive funding from the MTCP. Coelho Aff., Ex. A, Attachment # 6f, p. 1.

127. During the time period from January of 1994 to June of 1998, local Boards of Health and Health Departments, together with other local-MTCP-funded programs performed:

a. 46,568 checks of retail premises to make sure that they had appropriate signs indicating the prohibition on sales to minors;

b. 31,603 controlled buying attempts, in which youth under age 18 attempted to purchase cigarettes and reported on the results;

c. 7,561 checks of compliance with vending machine restrictions.

Connolly Aff., ¶ 8.

128. From January of 1994 to June of 1998 illegal sales of tobacco to minors in Massachusetts have resulted in a total of 1,910 citations and $139,325 fines levied by MTCP-funded programs. In March-May of 1994, the average non-compliance rate was 48% in MTCP-funded communities. Since that time, retailer compliance has improved, and the violation rate was under 10% in MTCP-funded communities in April-June of 1998. Connolly Aff., ¶ 10.

129. The MTCP assists in the funding of local boards of health and local health departments in Massachusetts, in part for the purpose of performing checks of local compliance checks. The citation rate (which is the percentage of observed violations which result in a citation) climbed from 13% in 1994 to 53% in the first half of 1998. Connolly Aff., ¶ 6.

130. The MTCP carries out checks of tobacco retailers in Massachusetts to determine in they are in compliance with M.G.L. c. 270, § 6 (prohibiting sales or distribution of tobacco to minors) as part of a project funded by the U.S. Food and Drug Administration. These compliance checks are performed in communities across Massachusetts, even where there was no local tobacco control program. Over 5,000 compliance checks

were carried out by the MTCP as part of this project in 1998. Over 8,000 compliance checks have already been performed by the MTCP as part of this project in 1999. During these compliance checks, the average non-compliance rate was 22.8% in 1998, and the average non-compliance rate for the first six months in 1999 was 29.7%. Connolly Aff., ¶ 11.

* * * *

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	CIVIL ACTION NO.99-11118-WGY
REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	**Expert Report of Dr. Edward V. Morse**

PHILIP MORRIS INCORPORATED,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts,	)
Defendant.	)
BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts,	)
Defendant.	)

Dr. Edward V. Morse is a behavioral scientist, trained at Cornell University. He received his Ph.D. in 1971. A major focus of his research has been health-related social patterns, and research methodology. After graduating from Cornell, Dr. Morse accepted an academic appointment at Tulane University as an Assistant Professor in 1971. He became an Associate Professor with tenure in 1977 and is now a full member of the Graduate Faculty at Tulane. Dr. Morse was awarded a Fulbright Scholarship in 1981 to conduct research and teach in the area of behavioral medicine in Bogota, Colombia. Dr. Morse served as University Chairman of the department of Sociology from 1977 to 1985. Since being at Tulane, he has

held a range of other positions, including Adjunct Associate Professor Department of Biostatistics and Epidemiology, Director of the Center for Applied Social Research, Clinical Professor of Psychiatry, LSUMC, New Orleans, Louisiana, and Adjunct Associate Professor of Pediatrics, Tulane University Medical School, New Orleans, Louisiana. For the last twenty-nine years, Dr. Morse has played an active research role in the scientific community.

Since 1990, Dr. Morse has received funding for work on more than 25 grants and contracts in the area of behavioral medicine. The vast majority of his research funding has come from the Centers for Disease Control and Prevention, the National Institute of Allergic and Infectious Diseases, the National Institute of Mental Health, the American Association of Retired People, and W.T. Grant Foundation. During the last decade, he has devoted the greater portion of his research effort to the study of factors underlying high-risk behavior patterns of adolescents and younger adults. Dr. Morse is currently the Principal or Co-Principal Investigator of over $1,000,000 in grants' funds. Dr. Morse's research findings have resulted in publication in a wide range of professional peer-reviewed journals, nationally and internationally presented posters, and nationally and internationally presented papers. He teaches a graduate level course in behavioral medicine and annually lectures on specific behavioral medicine topics to the Tulane School of Public Health and Tropical Medicine and the Tulane School of Medicine.

Dr. Morse has served as a consultant to the White House, the United Sates Department of Health and Human Services, the State of Louisiana (public schools and school-based health care) and other private and public agencies to assist in the translation of research findings into public policy which produce more effective programmatic interventions. Dr. Morse's curriculum vitae, which presents his professional, and academic activities in greater detail is attached.

SUMMARY OF OPINIONS AND BASIS FOR OPINIONS

Dr. Morse's opinions and testimony are based on his academic training, primary and secondary research experiences, field research experience, publications, consulting, the scientific literature on the issues, and ongoing review of other pertinent materials and other information reasonably relied upon by members of his profession. He also bases his opinion upon his review of advertisements, public opinion polls and surveys, government documents, and publications by the National Institutes of Health and Centers for Disease Control and Prevention. A list of principal references relied upon by Dr. Morse is attached. Dr. Morse's work in this case is ongoing. He may review additional documents and discovery produced or to be produced by the defendant and may supplement this report. Dr. Morse will rely on the work and opinions of other experts in this case. Dr. Morse may also offer testimony in response to related issues raised by the Commonwealth.

Dr. Morse will testify about high-risk behavior patterns among children and adolescents. Patterns of high-risk health behavior tend to occur in cycles and reflect fads or trends that differ within subgroups (e.g. males vs. females, 12 year-olds vs. 16 year-olds, etc.). As a group, a significant portion of adolescents is likely to engage in unsafe premarital sex, drive over the posted speed limit, not use seat belts, experiment with non-prescription street drugs and alcohol, smoke cigarettes, operate equipment without appropriate head safety wear, carry firearms, fight in school, and disregard proper nutritional intake and appropriate daily exercise. High-risk health behavior patterns may be placed on a continuum from behaviors with high probabilities of resulting in immediate health compromising consequences, to those with low probabilities of even a small negative long-term impact on health. As adolescents grow up, the majority greatly reduce or eliminate many high-risk health behavior patterns, including tobacco use.

Dr. Morse will also offer his opinion, based on decades of research and observation, that children's and adolescents' behavior patterns related to smoking are primarily and directly influenced by their peers' and parents' smoking behavior patterns. Past "focus group" data collected by the FDA, as well as national and international studies, demonstrate that smoking behavior patterns, similar to other high-risk health behavior patterns, are influenced by peers, parents, siblings, extended family members, and significant others in their local communities. Further, these same sources of influence play a predominant role in shaping the adolescents' choice to continue to smoke or abstain from smoking.

There is no credible social science research that demonstrates that adolescents' exposure to commercial marketing, advertising, promotions or sponsorships of any cigarette company has any impact on the decision to start smoking. Further, research findings suggest that adolescents' exposure to commercial marketing, advertising, or promotions and sponsorships statistically do not account for any pattern of smoking. If cigarette advertising had the impact on the smoking behavior patterns of children and young adults that it is alleged to have, one would expect smoking patterns of young people to be homogeneous (e.g. all adolescents exposed to cigarette advertising would smoke). Data from the 25-year trend study of substance use patterns conducted by the University of Michigan, fails to support such an assertion. Instead, the data clearly show that by age, grade in school, region of the country, gender and ethnicity, patterns of smoking vary in ways that have no relationship to cigarette advertising and promotion.

In fact, these patterns, which cannot be explained by exposure to advertising, are much more closely associated with social and psychological factors such as peer and family exposure. Indeed, these same social and psychological factors predict other high-risk behaviors, such as use of illicit drugs,

that are not advertised in any fashion. Thus, efforts to alter adolescents' smoking behavior by limiting their exposure to cigarette advertising are not likely to have any significant or meaningful impact on the smoking initiation patterns of adolescents.

Based on the literature and past experience, it has been demonstrated that the best way to reduce the incidence and prevalence of adolescent smoking is to enforce the state laws which prohibit minors from purchasing or possessing cigarettes. In recent years, state data on efforts to reduce underage smoking demonstrate overwhelmingly that vigorous enforcement of legal restrictions on underage access to tobacco products will reduce such smoking.

Dr. Morse will testify that during the last two decades a significant shift in thinking has occurred at both the state and national level regarding the most effective ways of addressing the question of adolescent smoking. Increasingly, states are exploring the significant impact that enforcement of laws can have on reducing adolescent access to and use of tobacco. Since the 1980s it would appear that the many efforts at educating the public regarding smoking and health issues have had the intended impact of gradually reducing the prevalence of adult smokers in the United States. This trend has not been mirrored in the smoking prevalence rates of adolescents during the same time period. Since the eighties, rates of adolescent smoking in general have either stubbornly stayed very stable, or within some groupings have actually risen. Data coming from both the Monitoring the Future Project and the National Youth Risk Behavior Survey underscore these trends in adolescent smoking. During this time period at least three major studies have found that where communities vigorously supported and enforced their laws regarding the prohibition of the sale of tobacco to persons under the age of 18 that tobacco usage by adolescents dropped significantly. Data from these and other studies examining a wide range of issues surrounding

the concept of restricting youth access to tobacco by means of the enforcement of laws overwhelmingly bolster the argument that youth access laws are the most powerful weapon our society has to address this health issue.

REASONS WHY PERSONS ENGAGE IN HIGH-RISK BEHAVIOR PATTERNS

Dr. Morse will testify about the reasons shaping a person's tendency to engage in high-risk health behavior. He will testify that there are significant others with whom the adolescent smoker identifies for his or her self-image and those groups consist of peers, family members, extended family members and others in the person's local community. Peer group affiliation directly impacts the prevalence of high-risk health behavior patterns in adolescents. A person's specific group or "crowd" membership or affiliation exerts a dominant influence on his or her high-risk health behavior patterns. Put simply, people like to belong to groups and do what their group of peers is doing. Adolescents take their cues from their actual circle of peers. This fact explains why cigarette advertising has little, if any, impact on adolescent smoking behavior.

SURVEY DATA REFLECTING HIGH-RISK CHOICE PATTERNS

Dr. Morse will testify that data from multiple sources all confirm the power and influence of friends, peers and family on why people start to smoke. Analysis of the extensive data collected by the Gallup Organization, the Food and Drug Administration, the Centers for Disease Control and Prevention, and even by defendant's expert, Dr. Dean Krugman, regarding why people smoke, makes it clear that adolescents begin smoking, not because of advertising, but because of social influences such as peers, parents, siblings, members of extended family, and significant others. These are the factors that adolescents identify consistently. Of equal importance is the lack of any survey or poll data that indicate

that commercial advertising by cigarette companies has any impact on an adolescent's choice to stag smoking. This absence of data is especially important when considered within the context of the models presented earlier, which stress the importance of peers and family members as major sources of influence in shaping smoking patterns by adolescents.

Over the last decade, behavioral science has generated an extensive body of research specifically focused on adolescents. By far the most significant research on youth health risk behavior patterns has been conducted as part of the Youth Risk Behavior Surveillance System (YRBSS). The CDC developed the YRBSS to monitor health risk behavior patterns of adolescents in six major categories: behaviors that contribute to unintentional and intentional injuries, tobacco use, alcohol and other drug use, sexual behaviors that contribute to unintended pregnancy and STDs including HIV infection, unhealthy dietary behaviors, and physical inactivity.

Since data was first collected in 1990, trends analysis has reached several significant conclusions. The high-risk health behaviors of youth across the six areas of risk behavior are highly correlated, as are the factors associated with each risk behavior. In other words, young people who engage in any one of these behaviors tend to engage in others as well, and the set of factors that predict one such behavior also tend to predict the others.

The 1997 YRBSS indicates that many high school age youths engage in behavior patterns that may significantly contribute to their likelihood of dying. For example, 19.1% rarely or never use a safety belt, 35.3% had ridden during the 30 days preceding the survey with a driver who had been drinking alcohol, 32.8% had ever used marijuana, 22.1% had carried a weapon during the 30 days preceding the survey, and 8.6% had attempted suicide during the preceding 12 months. In addition, 41.8% of the youth nationwide reported having been in a physical fight in the preceding 12 months; of the 50%

of all high school students who reported being sexually active, almost half reported not practicing safe sex techniques. Obviously, there is no commercial advertising promoting any of these behaviors.

Dr. Morse will also testify about the study of youth risk behavior patterns conducted by the University of Michigan Institute for Social Research entitled Monitoring the Future, 1975-1994. Monitoring the Future has been funded by the National Institute of Drug Abuse (NIDA) for the purpose of tracking substance use patterns, onset of use of a wide range of substances by adolescents, and their patterns of continued use or discontinuation over time. For both legal and illicit substances, data are gathered regarding students' attitudes and beliefs, beliefs and behaviors of others in their social environment, and perceived drug availability in their environments.

The differential rates of various high-risk health behaviors generally, and substance use specifically, strongly suggest that the observed patterns are best understood as culturally-based or anchored patterns which are shown to be specific to particular relatively homogeneous subgroups (e.g. black high school seniors), over time and exhibit strong trends suggesting substance use tends to occur in cycles and to reflect fads or trends that differ within subgroups (e.g. males vs. females, 12 year olds vs. 16 year olds, etc.). One pattern that seems to be very clear is age cohorts have a tendency to gravitate toward adopting those high-risk behavior patterns that preceding cohorts did not or do not use. An example of this tendency that the reader might easily identify is the recent rise (and subsequent decline) in cigar smoking as well as cigar bars and cigar restaurants, trends that appear to have been largely unaffected by commercial advertising.

Researchers are becoming increasingly aware that as individuals move through the life cycle from childhood and adolescence into adulthood, the primary socializing agent

responsible for dictating the cultural norms to be followed changes dramatically. During childhood, parents and other members of an individual's immediate nuclear, and in some cases, extended family, are the most important sources of information and the primary socializing agents. This gradually changes as a child moves into adolescence. During this next phase, the individual is much more attentive to his peers. Not until the child reemerges from adolescence and moves into young adulthood does he or she anchor his or her patterns of socialization based on older adults and adult dominated institutions. The general timing of the shifts in the life cycle as well as the shifts of the differential influences of peers over any particular range of the cultural, material, cognitive and normative dimensions of an individual's socialization are determined not only by chronological age, but social class, ethnicity and race as well.

For all the foregoing reasons and based on my extensive professional experience, it is my firm opinion that the decision of adolescents to begin smoking is influenced by many social and psychological factors, factors which are largely unaffected by regulation, and which do not include commercial advertising. Accordingly, restricting such advertising will not, in my opinion, affect the incidence of underage smoking. In particular, in my opinion the regulations challenged in this action will not contribute to their stated goal. Since regulation will not significantly affect demand, the logical strategy for reducing the incidence of underage tobacco is to restrict supply. Communities that have successfully reduced underage smoking have done so by a concerted and coordinated community effort to restrict underage access to tobacco products, and not by restricting cigarette advertising.

/s/ Edward V. Morse
Edward V. Morse Ph.D.

Dated: November 4, 1999

[Filed Nov. 5, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	CIVIL ACTION NO.99-11118-WGY and consolidated cases
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	**AFFIDAVIT OF LUCY L. HENKE, Ph.D.**
PHILIP MORRIS INCORPORATED, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	)	

BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

* * * *

Expert Report of Lucy L. Henke, Ph.D.

Professional Background and Qualifications

1. I am Associate Professor of Marketing at the University of Louisiana at Lafayette. An accurate copy of my curriculum vitae is attached as Exhibit A to this affidavit.

2. In addition to my academic activities, while I was employed with Louis Harris and Associates, I designed and conducted studies of the effectiveness of particular consumer advertising campaigns on behalf of companies engaged in consumer brand marketing. After I left Louis Harris, I was employed by ABC Television Marketing and Research Services Division and had responsibility for tracking viewer perceptions of ABC's and competing networks' news programming.

Summary of Opinions

3. For the reasons summarized in this report, it is my opinion, based on my experience in the field of advertising, marketing and consumer behavior and my review of the pertinent professional literature, that tobacco advertising and promotional activity play no role in the decision of minors (or anyone else for that matter) to use tobacco products. As a

result, I consider it most unlikely that restricting such activity will have any material impact on reducing the incidence of underage use of tobacco. In particular, this is true of the regulations that have been challenged in this action. I will discuss, first, generally accepted principles of advertising and promotion and consumer behavior that bear on the role of commercial marketing in consumer decision making, and, second, the application of those principles and the results of an extensive body of empirical research on the question of whether the commercial advertising and promotion of cigarettes and other tobacco products affects the incidence of underage tobacco use. A list of the principal publications on which I rely for my opinion is attached.

Role of Brand Advertising in a Mature Consumer Product Market

4. It is well-established in the field of marketing communications that in a mature product market, the effect of advertising and promotion is primarily to maintain brand loyalty and to encourage consumers of competing brands to switch to the advertised brands and to purchase the advertised brand as an "alternate" brand if the consumer's preferred brand is unavailable. Let me explain what I mean by a "mature" product market.

5. It has long been recognized that most consumer products pass through a product "life cycle." When a new product category is introduced (e.g., DVD players today, personal computers nearly twenty years ago), most consumers do not know what the product is, what its characteristics are and whether the product is useful or desirable. The purpose of advertising and promotion at this introductory stage is to stimulate demand for a product category regardless of brand. As the authors of a recent marketing text write:

> When an organization is the first to introduce an innovative product, it tries to stimulate *primary demand*—demand for

> a product category rather than for a specific brand of product—through pioneer promotion. *Pioneer promotion* informs potential customers about the product: what it is, what it does, how it can be used, and where it can be purchased. Because pioneer promotion is used in the introductory stage of the product life cycle, which means that there are no competing brands, it neither emphasizes brand names nor compares brands. The first company to introduce the compact disc player, for instance, initially attempted to stimulate primary demand by emphasizing the benefits of compact disc players in general rather than the benefit of its specific brand.

Pride & Ferrell, *Marketing: Concepts and Strategies* 398 (1997). For consumers, this type of advertising may be an important source of product information because other sources of information—e.g., personal experience with the product, the experiences of friends and family members, images of product use in the media—are largely unavailable as a result of the product's novelty. It is also significant that at this stage, all potential consumers, young and old alike, learn about the product's attributes at roughly the same time.

6. As a product category matures, advertising takes on a different role and purpose: from stimulating primary demand for the product category to stimulating "selective demand," i.e. maintaining or shifting consumer preferences for particular brands. For example, because automobiles are a mature product, consumers learn at a very early age from their families and their first-hand experience what a car does and for what activities a car is useful. People do not need commercial advertisements to help them decide whether they want a car (or a VCR or a toothbrush) in the first instance. The market for such products has matured and the purpose of advertising in such a market is to persuade those who have already decided to use the product to select the advertised brand. The focus is brand differentiation. For example, one automobile

manufacturer might stress the roominess and comfortable ride of its products, while another will emphasize sporty handling, a third stylish design, and a fourth great value. People who have no interest in owning a car, however, are not a target market for the marketers of automobiles, and those people largely ignore the vast majority of ads for automobiles.

7. It is very difficult for a marketer in a mature product market to affect aggregate demand for that product category. A good recent example of an attempt to do so is the campaign sponsored by the dairy industry to increase overall consumption of milk. While the "celebrity milk moustache" billboards and the "Got milk?" catchphrase are popular, the campaign apparently has not resulted in significantly increased milk consumption. In fact, consumption has declined every year during the time of this campaign. O'Guinn et al. (2000); *Marketing News* (1998). This lack of success is not surprising in light of what we know about consumer decision making. A consumer's decision whether to drink milk will be affected far more by whether the consumer likes the taste of milk and on whether family and friends drink milk than on even a very clever and engaging advertising campaign. Thus, even where a campaign is specifically designed to stimulate demand for a product category, it is very difficult through advertising to affect aggregate demand for a mature product. A campaign designed to promote a specific brand is even less likely to have such an effect.

The Market for Tobacco Products is a Mature Market

8. Cigarettes and smokeless tobacco products are classic examples of mature, if not declining, consumer product markets in which advertising is entirely brand advertising that seeks to stimulate selective demand for particular brands. In a mature or declining market, sellers are competing for market share and the goals of advertising and promotion are to persuade consumers of competing products to switch to the advertised brand as their primary or alternate brand choice

while, first and foremost, maintaining the brand loyalty of existing customers against the efforts of competitors to persuade them to switch. In a product market as large as that for cigarettes, even small percentage shifts in market share have huge economic significance. Even a one percent share of such a market represents hundreds of millions of dollars in revenues and justifies significant expenditures on advertising and promotion to protect and expand one's market share.

9. Research in the field of marketing confirms that tobacco advertising serves to stimulate selective, not primary, demand. As Wilcox (Wilcox 1991; Wilcox and Vacker 1992) and others have shown, there is no evidence that cigarette advertising does anything other than differentiate brands. Sturgess (1982) confirms the finding that cigarette advertising, which takes place in a mature product category, serves to stimulate selective demand. Duffy (1996) investigated the effect of total cigarette advertising on aggregate demand for cigarettes in the United Kingdom and found no evidence that advertising increased total market demand for cigarettes. Duffy concluded that a total ban on cigarette advertising would not reduce consumption but would have the effect of altering the market share of brands or types of tobacco products. The conclusions are consistent with the testimony of Daniel Oliver, the Chairman of the Federal Trade Commission before the Transportation Subcommittee of the House Committee on Energy and Commerce on April 3, 1987: "Far from stimulating overall demand by conveying new information to consumers about the uses of tobacco generally, tobacco advertising is likely to have its predominant impact in affecting the consumers' selection among competing brands."

10. The marketing focus of tobacco companies on existing smokers is even clearer with regard to promotions such as coupons, price discounts, and programs that reward brand-loyal smokers with non-tobacco merchandise. It is difficult to see how these programs can have any meaningful

value to non-smokers. A coupon or discount for an undesired product is worthless, and even if the premiums offered as a reward for repeat purchases are desirable to non-smokers, it is hard to believe that a non-smoker will purchase large numbers of undesired cigarettes just to earn sufficient credits to obtain an item that can be purchased directly for less than the total spent on the cigarettes. This is particularly true in light of the Master Settlement Agreement in which the major cigarette companies agreed not to offer merchandise branded with tobacco brand logos even to adult smokers. Whatever appeal branded merchandise might have had is obviously no longer relevant.

11. Any suggestion that tobacco products are not a mature market because new consumers are entering the market and older consumers are leaving it is specious. The same can be said of absolutely any consumer product. One of the principal characteristics of a mature market is that advertising is not a significant initial source of information about the product, and this is as true for tobacco products as it is for toothpaste. What distinguishes the mature market from markets for newly introduced products is that in the latter consumers of all ages are learning about the product at the same time for the first time without the benefit of prior experience.

12. In short, there is no evidence that the advertising or promotion of tobacco products has any effect on the initiation of tobacco use, increases aggregate tobacco consumption, or does anything other than influence brand selection.

Effect of Advertising on Behavior of Minors with Regard to Tobacco Products.

13. It is also my opinion that tobacco advertising and promotion plays no material role in the decision of minors to begin using tobacco products. In addition to the foregoing

principles, which I believe apply to adolescent consumers as well as to adults, I base my opinion on the following points.

14. First, there is a substantial body of empirical data that confirms that the decision of teenagers to use tobacco is primarily influenced by peers and family members. This research reveals no significant role played by tobacco advertising or promotion in influencing that decision.

15. Second, there is a dearth of credible social science research to support the hypothesis that tobacco advertising or promotion plays a role in the decision by minors (or anyone else for that matter) to begin to use tobacco products. The very few studies that purport to support this hypothesis suffer from such severe logical and methodological flaws as to provide no scientifically valid evidence.

16. Third, my own research and that of others suggests that children are fairly sophisticated consumers who learn at an early age that product advertising is intended to persuade and that they generally respond skeptically to advertising. Awareness of brand logos cannot be equated with a positive attitude toward the advertised product or an intent to purchase it, and my own research confirms that this is true with regard to tobacco advertising.

17. Fourth, the experience in other countries that have imposed restrictions or bans on tobacco advertising suggests that such efforts have little or no effect on tobacco consumption.

18. In the remainder of this report, I will elaborate on these four points and respond to the arguments made by the defendant's experts.

Smokers Consistently Fail to Identify Advertising as a Reason for the Decision to Begin Smoking

19. Years of polling research confirms that peer and parental influence, and not advertising, drive adolescent

decisions to begin smoking. The Gallup Organization has conducted surveys over the years which ask a nationally representative sample of adults (1993) and adolescents (1994) why they began to smoke. In both surveys the majority of respondents identified peer influence as the driving force, followed by parental influence. Attached as Exhibits B and C are graphs summarizing these results. These surveys were open-ended in the sense that Gallup simply asked the question without offering a list of possible responses. In a closed-ended poll that offered advertising as one of the choices, only 1% of the respondents cited advertising as an influence. (Gallup 1991) Attached as Exhibit D is a graph summarizing these results. Consistent with open-ended surveys, peer influence was cited by the majority of respondents, followed by parental influence, curiosity and rebellion. Social science research using survey methodology which permits respondents to select multiple influences yields the same results. (Zinser 1997) Attached as Exhibit E is a graph summarizing these results.

20. Contrary to the contentions of some that individuals may be reluctant to identify advertising as an influence due to embarrassment, the Zinser poll confirmed that advertising is an influence on brand choice. Specifically, when respondents were asked about the influence that advertising had on brand choice, advertising came in third out of five. Research in other areas confirms that people are willing to identify advertising as an influence on decisionmaking when it does, in fact, have such an influence.

Source Other Than Advertising and Promotion Significantly Influence Underage Tobacco Use

21. Many studies provide evidence that young people acquire information about products, including tobacco products, from many sources other than advertising. (Adler, et al., 1980; Tinsley 1992; Moschis 1985; Ward, Wackman and Wartella 1977)

* * * *

30. Numerous other studies corroborate and confirm the conclusion that relatives and peers are the most significant influences on a minor's decision to begin smoking. They include: Oygard et al. (1995), Wang et al. (1997), Jackson (1997), Conrad et al. (1992), McDonald (1993), "Teenage Smoking: National Patterns of Cigarette Smoking, Ages 12 through 18, in 1968 and 1970," U.S. Dept. of Health, Education and Welfare (1970); Gallup polls (1977, 1994); Zinser (1994).

- *Absence of Credible Evidence Linking Tobacco Advertising with Smoking Initiation*

31. Second, there is no credible social science research that supports the proposition that exposure to tobacco advertising leaders to smoking initiation, and no evidence whatsoever that the particular marketing practices prohibited in the regulations challenged in the litigation have any impact on the decision of adolescents to begin to use tobacco.

32. In order to demonstrate a link between tobacco advertising and underage smoking initiation, it would be necessary to undertake a "longitudinal study," i.e. a valid study of a sample of minors over time that measured changes in smoking behavior and found a statistically significant relationship between exposure to tobacco advertising or promotion and such changes in behavior. As noted above, there are a number of longitudinal studies demonstrating the influence of family and peers on smoking inititiation. There is only one published paper that claims to have found such a relationship between tobacco marketing and smoking initiation: Pierce et al. (1998). The Pierce study claims to be the first longitudinal study to "provide[] clear evidence that tobacco industry advertising and promotional activities can influence nonsusceptible never smokers to start the process of becoming addicted to cigarettes." (Pierce 1998, at 514) It does nothing

of the sort. For the reasons set forth below, the Pierce study is deeply flawed and provides no scientifically valid evidence for any link between tobacco marketing and smoking initiation by minors.

* * * *

48. The only other longitudinal study that I have seen which purports to find a link between tobacco advertising and promotion and smoking initiation is an unpublished article by Biener and Siegel (in press) that was submitted to the court in this case. This article employs essentially the same methodology as the Pierce study, and consequently suffers from the same deficiencies. Indeed, the authors corroborate my opinion that "receptivity" is a proxy for the influence of family and friends rather than an independent predictor. They state: "Receptivity was significantly associated with living in a household where at least one adult smoked, having one or more smokers among one's close friends, being an early experimenter and scoring above the median in rebelliousness."

49. I am aware of nothing else that even purports to be a longitudinal study demonstrating any kind of causal link between tobacco advertising or promotion and smoking initiation by minors (or anyone else for that matter). Since the Pierce and Biener studies provide no credible evidence to support such a link and since the literature is replete with studies identifying other factors such as peer and parental influence as of primary importance, I conclude that there is no basis in social science literature to conclude that such a causal link exists. The absence of such evidence is not surprising since it would contradict what students of marketing have long understood about the role of advertising and promotion in a mature product market.

Children are Relatively Sophisticated Consumers and Typically Learn to React Skeptically to Advertising.

50. The arguments in favor of advertising bans are premised on the assumption that minors are vulnerable "sponges," incapable of recognizing the persuasive intent of advertising messages. However, this assumption has been thoroughly discredited by studies of children's perceptions of advertising.

* * * *

54. The later studies demonstrated that when a nonverbal measure is used, even younger children can express an understanding of the persuasive intent of ads. Studies by Henke (1980) and Donohue, Henke and Donohue (1980) found that as many as 75% of 3-year-olds were able to express an understading of the persuasive intent of ads when a nonverbal measure was used. By the age of 6, 96% of the children in these studies indicated an understanding of selling intent when a non-verbal measure was used.

55. The significance of this research is that children, like adults, who understand the persuasive intent of an advertisement are more likely to be skeptical, even cynical, about the advertised message. The concept of "source credibility" helps to explain the relationship between identification of the selling intent of an ad and skepticism of the advertised message.

* * * *

75. In fact, a study I conducted with Dr. Michelle Wolf (Henke and Wolf 1995) demonstrated that parents of young children have used the Joe Camel brand advertising logo to reinforce anti-smoking messages with their children. Parents as well as older siblings and peers play a very important role in influencing young people's decisions about smoking. Using cigarette advertising symbols to deliver anti-smoking messages

to children is but one example of the way in which consumers use advertising.

Cigarette Advertising is not "Pervasive" to Minors

76. Advocates of tobacco advertising bans frequently claim that extreme steps are needed because tobacco advertising is "pervasive." This term is not usually defined, but the rhetoric of "pervasiveness" is usually coupled with figures (derived from FTC reports) that suggest that the tobacco industry spends vast sums on advertising and promotion.

77. A comparison between the tobacco industry and other consumer product industries, however, reveals that tobacco marketing expenditures are comparatively modest. For example, attached as Exhibit F is a chart (based on Competitive Media LNA/Media Watch Multi-Media Service Ad Dollar Summary, January-December 1996) showing where tobacco advertising expenditures compare with advertising expenditures for other industries. Amounts spent on advertising tobacco products in the United States is less than 10% of the amounts spent on marketing automobiles, and considerably less than the amounts spent on marketing food, toiletries and cosmetics, computers/office equipment, apparel, insurance, and many other product categories. In 1997, the amount spent on cigarette advertising was only .8% of the total amount spend on advertising in the U.S. See Exhibit G.

78. Moreover, tobacco marketing is completely absent in broadcast media. It is well-known that television is the medium most likely to reach underage audiences. In addition, the 1998 settlement agreement between tobacco manufacturers and 46 states including Massachusetts imposes further limits on cigarette advertising (e.g. no transit advertising, no billboards). To be sure, the research summarized above makes it clear that minors are familiar with at least the most widely promoted cigarette brands. It is, however, misleading to say that

cigarette advertising today is a dominant presence in the advertising that young people encounter.

There is No Discernible Relationship between Expenditures on Cigarette Advertising and Promotion and the Incidence of Underage Smoking.

79. Some advocates of restrictions on tobacco advertising and promotion have claimed to have found relationships between specific cigarette advertising campaigns and trends in smoking incidence. The publicly available data simply do not support this contention.

80. Attached as Exhibit H to this report is a graph that plots cigarette sales and tobacco industry marketing expenditures (all as reflected on industry reports to the Federal Trade Commission) for the period 1970-1995. Cigarette sales have generally declined while advertising expenditures either rose or remained constant while spending on non-advertising promotions generally increased. Nothing in these data suggests any causal link between marketing expenditures and smoking consumption.

81. Moreover, if one compares aggregate spending on cigarette advertising and promotion and the incidence of youth smoking over time, it is also apparent that there is no relationship. Attached as Exhibit I is a graph that plots tobacco industry marketing expenditures (as reflected on industry reports to the FTC) and the percentage of high school seniors smoking in the past 30 days (derived from the University of Michigan's "Monitoring the Future Survey"). As the graph illustrates, there is no basis for inferring a causal link between marketing expenditures and adolescent smoking. The incidence of youth smoking has generally declined but even in years when it has not declined there is no evident relationship between tobacco marketing expenditures in the period immediately preceding the change and the change itself.

* * * *

86. Advocates of advertising restrictions also argue that adolescents are encouraged to begin smoking through the "allure" of toacco advertising which conveys images of "independence, healthfulness, adventure-seeking and youthful activities." They further argue that teens take up smoking to achieve these desirable qualities. In fact, however, there is almost no consumer product being advertised today that does not utilize one or more of these very same themes and images in its advertising. Truth be told, the old, the infirm, the dependent and the "boring" are not frequently (if ever) pictured in advertising for any consumer product. In light of the ubiquity of the themes of youth, attractiveness, health, and adventure in American advertising today, one must ask why a teen would choose to smoke to identify with these attributes rather than simply buy an advertised fragrance, show or blue jean unless something more than advertising was in play.

Experience in Countries that have Restricted or Banned Tobacco Advertising Suggests that such Actions have Little Effect on Smoking Rates

87. If the advocates of restrictions on tobacco advertising and promotion were correct, then one would expect to see that the implementation of such restrictions in other countries would consistently result in a reduction of smoking incidence, particularly on the part of minors. In fact, the data do not support this conclusion. The experience of countries that have implemented advertising bans is far more equivocal. Indeed, some of the countries that have implemented such bans have experienced an actual increase in smoking rates.

88. In Canada, when cigarette brand advertising was banned in 1990, consumption among young people went up. This increase occurred after a twenty year decline in overall consumption in Canada. In Norway, consumption of tobacco in 1996 remained unchanged from 1975, the year an advertising ban was introduced. In Finland, smoking among young people has increased since the advertising ban of 1978.

89. In addition, it is worth noting (as the Surgeon General did in his 1979 report) that in Communist countries such as China and the former Soviet Union, where consumer advertising was not permitted, smoking rates were quite high. Rosch (1996) reported that "[w]hile smoking decreased by 25-38% in Western Europe during the last decade, it has increased 4-11% annually in Russia." He further notes that more than 15% of 5th grade Russian boys smoke. In China, tobacco use rates are increasing. Li, et al. (1996) report that smoking is prevalent among early adolescent Chinese youth, and that the annual increase of cigarette consumption between 1982 and 1990 was over 7% (referencing Stanley, 1993).

Signed under the pains and penalties of perjury this 4th day of November, 1999.

/s/ Lucy L. Henke
Lucy L. Henke, Ph.D.

[Filed Nov. 5, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	CIVIL ACTION NO. 99-11118-WGY
REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	

PHILIP MORRIS INCORPORATED, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	
BROWN & WILLIAMSON TOBACCO CORPORATION, Plaintiff, v. THOMAS REILLY, Attorney General of the Commonwealth of Massachusetts, Defendant.	)	**EXPERT REPORT AND AFFIDAVIT OF LAURENCE J. DeFRANCO**

LAURENCE J. DeFRANCO, being of legal age and duly sworn, deposes and say:

1. I am the president and co-founder of InContext, Inc., an international information company located in Washington, D.C. that performs digital computer mapping and charting of economic data. I make this affidavit based on personal knowledge.

2. I have expertise in the field of geo-economics, which merges the disciplines of economics, geography, and computer science. More detailed information about my background,

including the articles and books I have authored, and information about InContext, is attached hereto as Exhibit A.

3. In May of 1998 I was asked to prepare, and did prepare on behalf of the four tobacco companies that are plaintiffs in these consolidated actions, maps depicting the precise amount of area which would remain potentially available to outdoor advertisers of tobacco products in three Massachusetts cities under regulations proposed by the Massachusetts Attorney General that would restrict outdoor tobacco advertising. Proposed 940 CMR 2.04(d). The maps that I prepared, and an accurate description of the methodology I used to prepare the maps, were filed in the administrative record on Proposed 940 CMR § 2.01 et seq., as attachments to Comments on the proposed regulations filed by the four companies dated June 18, 1998. True and correct copies of the maps I prepared, and of the statement of my methodology, are attached as Exhibits B and C hereto.

4. The maps I prepared show the area that would remain available for outdoor advertisers of tobacco products if the Attorney General's prohibition on outdoor advertising covered an area within a radius of 1,000 yards from schools, parks and playgrounds (as indicated in the Attorney General's Proposed Regulations), and also showed the area that would remain available for outdoor advertising if the prohibition covered an area within a radius of 1,000 feet, from schools, parks and playgrounds, which is the area of the prohibition indicated in the Attorney General's final regulations, now codified at 940 CMR § 21.01 et seq.

5. As described in the attached statement of the methodology I used to prepare the maps, Exhibit C hereto, the attached mapping analysis involves no assumptions, no theories and no estimates. It is based on official United States Geological Survey maps for each city.

6. My analysis demonstrated that, if a 1,000 foot radius is used to define the area where outdoor advertising is prohibited, which is the area specified in Section 21.05(5) of the Attorney General's final regulations: (a) the percentage of the Land Area of the City of Boston that would be unavailable for outdoor tobacco advertising is 90.6%; (b) the percentage of the Land Area of the City of Worcester that would be unavailable for outdoor tobacco advertising is 87.8%; and (c) the percentage of the Land Area of the City of Springfield that would be unavailable for outdoor tobacco advertising is 88.8%. See Exhibit C hereto. These results are depicted on the maps attached hereto as Exhibit B.

Signed under the pains and penalties of perjury this 2nd day of November, 1999.

/s/ Laurence J. DeFranco
Laurence J. DeFranco

Sworn to and subscribed before me this 2nd day of November, 1999.

[illegible]
Notary Public

My Commission expires November 30, 2002.

[Filed Nov. 5, 1999]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LORILLARD TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	**CIVIL ACTION NO. 99-11118-WGY and consolidated cases**
R.J. REYNOLDS TOBACCO COMPANY, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	AFFIDAVIT OF ROLF PROVAN
PHILIP MORRIS INCORPORATED, Plaintiff, v. THOMAS REILLY, Attorney General Defendant.	

BROWN & WILLIAMSON TOBACCO CORPORATION,	)
Plaintiff,	)
v.	)
THOMAS REILLY, Attorney General	)
Defendant.	)

Rolf Provan, being duly sworn, deposes and states as follows:

1. I am director of trade development at Brown & Williamson Tobacco Corporation ("B&W") and have held this position since February 1998. Prior to becoming Director of Trade Development, I was Director of Marketing Information from April 1996 through January 1998; Brand Manager from September 1995 to March 1996; Regional Director from February 1994 through August 1995; Area Market Manager from July 1992 through January 1994; International Marketing Coordinator from December 1991 to July 1992. From 1989 to 1991, I worked in various local sales and marketing positions with affiliates of B&W located in Chile and Hong Kong. I am competent to make this affidavit, which is based on my personal knowledge of the information stated below.

2. During my nearly eight years at B&W, I have become knowledgeable about B&W's cigarette sales and marketing programs to retail outlets. Over the past 18 months, I have worked closely on the development and implementation of B&W cigarette promotional and merchandising programs. As part of my job responsibilities, I have become very familiar with B&W's present marketing efforts for all of its major domestic cigarette brands, including the impact that promotional

programs, including buy-downs, stickers and other discounting methods, and merchandising programs, such as indoor displays and signage, have on the sale of cigarette brands.

3. B&W is the third largest cigarette manufacturer in the United States. Last year, B&W's share of the domestic market was approximately 15%. B&W manufactures and sells both "premium" brands, such as Kool®, Carlton®, Capri® and Lucky Strike®, and value-for-money, or "value" brands, such as GPC®.

4. The purpose of B&W's marketing efforts is to increase our share of adult smokers by building and developing brand equity (the reputation and good will associated with a particular brand) for our cigarettes. Increasing brand equity maintains loyalty among current adult smokers of B&W brands and encourages adult smokers of competitive brands of cigarettes to switch to a B&W brand.

5. Brown & Williamson's marketing plans are not designed or intended to attract non-smokers, or smokers under the age of 21. Since the mid-1960's, B&W has adhered to internal and industry cigarette marketing codes designed to restrict our intended advertising audience to adults 21 years or older, and limit our marketing to techniques, locations and mediums aimed at adult smokers. B&W has supported industry efforts and initiated company efforts to educate minors not to smoke and to educate retailers not to sell to minors. Our Corporate and Youth Responsibility department works companywide to monitor our marketing efforts and to develop new strategies and programs to reduce underage smoking.

6. I understand that the Challenged Regulations would prohibit self-service product displays and require all tobacco products to be kept out of the reach of consumers at all retailers, and would eliminate outdoor advertising and indoor advertising lower than five feet off the ground at many retail outlets.

7. Our experience at B&W indicates that the retail environment is the primary source of brand awareness for adult smokers.

8. Channels for communicating with adult consumers regarding cigarettes have been drastically reduced due to the current regulatory environment. Because many traditional avenues of communication, including but not limited to outdoor billboards, transit stop and taxi signs, have been eliminated, retail display space and signage is more crucial now than ever before to the advertising and promotion of cigarette brands.

9. Laws that restrict or eliminate self-service displays, such as 940 CMR §§ 21.04(2)(c) & (d) are causing available retail display space for cigarettes to shrink to the limited space available behind the sales counter (the "backbar") or beneath the counter and wholly out of sight.. This is especially true in "pack outlets," e.g., convenience and gas stores, where available display area is already much less than in supermarkets and other types of stores. This limited space is usually devoted to only a few brands.

10. Similarly, laws that restrict or eliminate retail signage, both indoor and outdoor, further cause a dramatic reduction in the avenues available to B&W to communicate to adult consumers who choose to smoke.

11. The display of a cigarette brand at retail is a vitally important form of communication which gives the manufacturer the opportunity to reinforce the brand's existence and prominence to smokers of that brand and also provides the primary opportunity to encourage adult smokers to pick up, view and purchase a pack of an unfamiliar brand or a newly introduced or repositioned brand.

12. If a cigarette brand is not visible at retail or is relegated to space that is not in the line of sight of a potential adult consumer, that brand will have great difficulty communicating

its availability and/or competitive characteristics as compared with more visibly displayed brands.

13. Space for both product displays and promotional materials at pack outlets, as well as all outlets which sell tobacco products, is significantly limited. Much of the available space for visible display and promotion at the point-of-sale at pack outlets are self service displays on countertops.

14. In addition, the requirement that all advertising be placed five feet or more above the ground at most retail outlets further eliminates alternative means that B&W uses to communicate with adult customers, such as change mats, cash register signs, counter top signs, or mid-level display rack signs. Common sense and experience indicates that the amount of space five feet or more above the floor that is not taken up by shelving, coolers or freezers, windows, and is otherwise available for advertising is limited, especially at pack outlets. Even now, retailers generally are paid a premium for such space.

15. Point of sale advertising and merchandising, including primarily self-service displays, are critical to B&W's communication with its current customers as well as potential customers who currently smoke non-B&W brands. Indeed, many of our key brands are marketed predominantly through the use of self service displays and by promoting price competition at the retail counter.

16. B&W's value for money brands are promoted almost exclusively through self-service displays and other point-of sale advertising. The success of GPC® and other value brands is dependent on their ability to attract customers of premium brands at the point of sale through price promotions, including use of discount stickers on packs, buy-one-get-one-free programs, and "buy downs" in which B&W sales representatives pay a retailer to discount the consumer price on a given brand. The ability to communicate these price

promotions to adult smokers at the point-of-sale through ready access to marked-down packs at countertop product displays are therefore central to the competitive existence of these brands. The Massachusetts regulations would render these products virtually invisible, denying adult consumers even basic identifying information such as what the pack label looks like.

17. The growth of the value segment has come predominately from consumers who, upon seeing a self-service display and other in-store promotions, decide to try a new B&W value-for-money cigarette rather than their usual premium brand cigarette. Unless an adult consumer can see the value cigarette and the price at the point of sale, our experience teaches us that loyal customers may believe that the retail outlet does not carry the product and that potential new customers will never learn of the product or the promotion.

18. Historically, we have observed that consumers have imperfect pricing and promotional information about the value brands. If B&W is not able to indicate to the consumer at the point of sale pricing and other information, consumers will simply purchase visibly-displayed premium brand cigarettes with which they are more familiar.

19. With little or no space to display, advertise and promote, it will be extremely difficult for B&W to communicate with consumers regarding B&W's premium brands as well. The ban on self-service display and the significant restrictions on other point-of-sale advertising make it more difficult, if not impossible, to reposition the image or significantly raise adult consumer awareness of an existing brand. Over the past few years, B&W has invested large sums in repositioning many of our premium brands, such as Kook® and Carlton®. Self-service display was of vital importance for B&W to communicate to current brand smokers and potential brand-switchers the product's new brand identity and packaging.

20. Further, B&W's launch of new brand styles, most recently Lucky Strike Filters® and Kool Natural®, are heavily dependent on point-of-sale promotion and self-service display. Self-service displays allow an adult consumer to examine a new product and review its packaging, which may contain brand equity, price or other product information, customer service contacts, and, of course, the Surgeon General's warning.

21. As the third-ranking cigarette manufacturer, it is especially important for B&W to achieve visibility for its brands at retail in order to persuade adult smokers to continue to smoke or to switch to our brands. It is our experience that adult consumers will be much more likely to purchase our brands if we are able to sufficiently communicate our brands, and price promotions to customers through self-service displays and point-of-sale advertising.

22. If our products are forced behind or under the counter throughout the Commonwealth of Massachusetts by these regulations, B&W will be denied critical avenues of speech to lawful consumers of our products. If, as the regulations contemplate, all tobacco products are forced behind the counter, the less dominant brands, value brands, niche products, and new products will become virtually invisible. The five-foot restriction on indoor that would be placed on many retail establishments will further eliminate B&W's ability to communicate with adult smokers. Due to our market position and the array of brands B&W sells, most if not all B&W brands will be stored out of view and reach of customers. Being denied these avenues of communication would cause B&W irreparable injury.

Signed and sworn under the pains and penalties of perjury this 5th day of November, 1999.

/s/ Rolf Provan

Rolf Provan

COMMONWEALTH OF KENTUCKY)
) ss
COUNTY OF JEFFERSON)

Sworn and subscribed to
before me this 4th day of
November, 1999.

/s/ Ann le Barnicott
Notary Public

My commission expires: Notary Public, State at Large, KY
My commission
expires Mar. 17, 2001

GROWING UP TOBACCO FREE PREVENTING NICOTINE ADDITION IN CHILDREN AND YOUTHS

Barbara S. Lynch and Richard J. Bonnie, Editors

Committee on Preventing Nicotine Addition
in Children and Youths

Division of Biobehavioral Sciences and Mental Disorders

Institute of Medicine

NATIONAL ACADEMY PRESS

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NOTICE: The project that is the subject of this report was approved by the Governing Board of the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. The members of the committee responsible for this report were chosen for their special competencies and with regard for appropriate balance.

This report has been reviewed by a group other than the authors according to procedures approved by a Report Review Committee consisting of members of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

The Institute of Medicine was chartered in 1970 by the National Academy of Sciences to enlist distinguished members of the appropriate professions in the examination of policy matters pertaining to the health of the public. In this, the Institute acts under both the Academy's 1863 congressional charter responsibility to be an adviser to the federal

government and its own initiative in identifying issues of medical care, research, and education.

* * * *

4 TOBACCO ADVERTISING AND PROMOTION

INTRODUCTION: MAINTAINING THE MARKET

Every day, children and youths in the United States are exposed to a wide array of persuasive, carefully crafted commercial messages encouraging the use of tobacco products. In 1991 the tobacco industry spent $4.6 billion–more than $12.6 million a day, $8,750 a minute–on advertising and promoting* cigarette consumption, and over $100 million on advertising and promoting smokeless tobacco products.[1] During the past 15 years, the tobacco industry has nearly quadrupled** its marketing expenditures, at a time when tobacco consumption has been declining. Each day, approximately 3,500 Americans quit smoking and an additional 1,200 tobacco customers and former customers die of smoking-related illness; therefore, maintaining current levels of tobacco use and revenues requires that approximately 5,000 new smokers be recruited every day (about 2 million a year).[2] Children and youths constitute the most likely source of new smokers. The 1991 National Household Surveys on Drug Abuse data reveal that the large majority (89%) of persons ages 30-39 who ever smoked daily tried their first cigarette by age 18, and 62% by age 16; over three quarters (77%) were smoking daily before age 20.[3] At least 3 million American teenagers smoke regularly and 3 million people who regularly use smokeless tobacco are under Age 21.[4]

* * * *

What factors have contributed to stable smoking rates and to increased rates of smokeless tobacco use among children and youths, but have proven to be less effective in sustaining

tobacco use by adults? Public health advocates suggest that youths have a heightened sensitivity to image advertising and promotion themes at a time in their lives when they are struggling to define their own identities. Adolescence is characterized by three major types of developmental challenges: (a) physical maturation, (b) cultural pressures to begin the transition to adult roles and emotional independence from parents, and (c) establishment of a coherent self-concept and values.[11] Cigarette advertisements are often evocative and play off these challenges in addition to being positioned to appeal to specific groups defined by social class and ethnic identity. Early adolescence (ages 11-14) in particular may be a time of increased susceptibility to the appeal of image advertising and promotions. The possible effects of marketing techniques on youths are considered below.

* * * *

Promoting Tobacco Use to Consumers

The goal of marketing is to increase the appeal and acceptability of a product as well as to make the product available to the potential consumer. Tobacco marketing strategies (a) establish attitudinal predispositions that lead nonusers to experiment with tobacco products and interpret their experience as positive and rewarding, (b) foster the perception that consumption of tobacco products in general and in particular contexts (places, times) is normative, (c) minimize concern about the potential risks associated with tobacco use, propagating the perception that there are "safe" smoking options, and (d) reassure smokers and users of smokeless tobacco that possible risks are worth the benefits received from tobacco use. Marketing strategies promote both brand-specific and aggregate tobacco use. The impression that tobacco use is desirable and normative is conveyed through image advertising and promotions that make tobacco products highly visible in public spaces–if not by their presence, then by proxy in the forms of brand trademarks, insignia, logos, and

items associated with preestablished brand images (for example, adventure scenarios). The major forms of marketing are highlighted below.

* * * *

2. *Promotional allowances* constitute the second largest tobacco marketing expenditure–25% of all marketing-related expenditures.

* * * *

As a result of trade incentives, cigarettes and other tobacco products are displayed prominently where adults as well as youths of all ages can see them. Self-service displays are an important source of tobacco products for minors.[18] Cigarettes are commonly displayed near checkout counters, and flavored chewing tobacco has been reported to be displayed near candy racks in convenience shops. A survey in California of stores near high schools found chewing tobacco next to candy and snacks in 42% of the stores.[19]

* * * *

3. *Point-of-sale advertising* showcases particular brands of cigarettes in shops to stimulate impulse purchases. Since the 1971 ban on broadcast advertising, tobacco companies have made marketing through distribution a major function of their sales forces, which numbered more than 9,000 industry wide in the early 1980s.[20] This marketing technique places the tobacco products in convenient, visible racks, usually self-service, and in point-of-purchase displays.

* * * *

Point-of-sale advertising in retail establishments has been increasing and in 1991 represented 7.4% of advertising and promotional expenditures.

* * * *

5. *Outdoor Advertising*

* * * *

More permanent than magazine advertising, and seen over and over again by youths, billboard ads expose children repeatedly to pro-tobacco messages and give the erroneous impression that smoking is pervasive and normative.

* * * *

Market Segmentation to Reach Youths

Considerable research on the part of the tobacco industry has resulted in the positioning of specific brands in different market segments. This entails vigilant monitoring of changing responses to brand images and consumption patterns among specific populations in a competitive market. Particular market niches are targeted for intensive advertising activities. Capturing a share of the starters market, which is predominantly under age 20, is important to tobacco companies because of the amount of brand loyalty and switching within brand families. Several studies have been specially commissioned by the tobacco industry to study the youth market,[42] although the tobacco industry has claimed that it does not target underage youth in its advertising campaigns. Youths constitute not only a market segment in their own right but also a subgroup of market segments defined in relation to gender, socioeconomic status, ethnicity, etc. Research suggests that, regardless of intent, marketing pitches aimed at young adults ages 20-25 are also appealing to youth of the same class, gender, and ethnic group. For example, the tobacco industry heavily advertises in magazines that appeal to youthful readerships, for example *Spin, Rolling Stone, Cycle World, Mademoiselle, Glamour,* and *New Woman.*[43] A consideration of the impact of advertising on children and youths therefore demands an understanding of those subpopulations targeted by the industry as market growth segments: women, the less educated, and ethnic groups. A

method for identifying which market segments are specially targeted by the tobacco industry would entail trend surveillance of two elements of tobacco advertising and promotion: (1) where the ads are being placed and therefore who is likely to see the ads, and (2) to whom the context and message of the ads appeal.

* * * *

Psychosocial Mechanism Through Which Advertising Influences the Behavior of Children and Youths

* * * *

Psychologists have described specific mechanisms by which advertising makes tobacco use appear attractive to smokers and potential smokers. Ajzen and Fishbein's *theory of reasoned action* postulates, in brief, that intentions to perform a particular act are predicted both by a person's attitude toward the act and by normative beliefs about it, concordant with "what others think."[50] Ajzen and Fishbein argue that personal attitudinal factors are probably more important in decisions that adults make concerning smoking, whereas social normative factors are more important in the decisions of children. Other psychologists have suggested that children understand the intent of image advertising at a young age.[51] According to the theory of reasoned action, advertising can function either as a direct normative influence by shaping a child's image of what it means to be a smoker or as an indirect normative influence by increasing peer pressure associated with the emulation of role models provided by cigarette advertising. In his exhaustive 1976 review of the literature, Fishbein noted: "there can be little question that cigarette ads attempt to create a positive image of the 'smoker.'" He concluded that "our review suggests that cigarette advertising does affect cigarette consumption."[52]

* * * *

Image advertising, smoking is portrayed as an expression of independence, individualism, and social sophistication. It engages the consumer in a fantasy and invites the consumer to participate in a promise "that the product can do something for you that you cannot do for yourself."[54] A self-image that the target audience already desires is reinforced.[55] For example, smoking is associated with a strong masculine self-conception. It is depicted as relieving stress, and as winning the admiration of wholesome, fun-loving peers. The models in cigarette ads appear healthy and happy, in stark contrast to the negative health consequences of smoking. Adolescents who evaluate positively the attributes of models used in cigarette advertising strongly overestimate the prevalence of smokers and give less thought to long-term consequences of risky behavior.[56]

* * * *

Early adolescence has been characterized as a period of heightened self-awareness as well as preoccupation with one's self-image. Elkind and Bowen described the notion of the imaginary audience, wherein young adolescents feel that they are always on a stage with imaginary others monitoring and evaluating their appearance and activity.[58] Indeed, studies have shown that adolescents whose actual self-concepts are consistent with their perceptions of "stereotypic"smokers (derived from advertisements) are more likely to smoke.[59] Among nonsmokers, teens who admire the attributes depicted by smokers in ads are also more likely to intend to smoke in the future.[60] In order to acquire selected attributes of model smokers, adolescents may be motivated to use tobacco, even when they view smoking as negative.[61]

Social psychologists have found that the tendency to choose behaviors that are consistent with self-concept is stronger when one's self-concept is threatened.[62] Smoking experimentation commonly occurs at transition points in

adolescence when there is a threat to a teen's emerging self-concept: "Teenagers are typically less secure in their identities than most groups in the population, and their age-appropriate task is in part to experiment with different adult identities. They are more subject to social pressure and more attuned to advertising than most groups in the population."[63]

* * * *

Themes and Images

Considerable psychographic research underlies tobacco ad designs.[69] Image advertising tends to appeal to youths.[70] Notably, each of the three brands (Marlboro, Newport, Camel) most popular among youths maximizes a considerable amount of image-based advertising.[71] Even children ages 6-10 are able to identify the images and slogans associated with popular brands of cigarettes.[72] The symbols of the most popular cigarettes among youths, a cowboy and a camel cartoon character, are more likely to appeal to children than to adults.[73] In addition to the theme of independence noted above, five other themes are pervasive in tobacco ads: that tobacco use is a rite of passage to adulthood, that successful people use tobacco, that tobacco use is relaxing in social situations, that tobacco use is normative, and that tobacco use is safe.

1. "*Tobacco use is a rite of passage to adulthood.*" Advertising associates smoking with a passage from childhood to adulthood through sets of images and messages. Smoking is portrayed as a marker of social status (adulthood) and of pleasure appreciated by popular young adults whom teens wish to emulate. Market research has found that teens are more attracted to young adult models in advertisements than to other teens.[74] "Adult themes"–adventure, rugged individualism, independence, sophistication, glamour, and sex–appeal to youths, a fact well established by research of the youth market.[75]

* * * *

2. "*Successful, popular people use tobacco.*" Advertisements effectively associate smoking with sophistication in social and sexual relations. Tobacco image advertisements are appealing to those who are young and impressionable, who would like to acquire the attributes of the models in the ads. The brands most successful with teenagers commonly employ evocative images in their advertising, whether in the form of models or cartoon characters that depict success, sophistication, and self-reliance.[77]

* * * *

3. "*Tobacco use is relaxing in social situations.*" Advertisements position cigarettes and other forms of tobacco as products facilitating peer acceptance. Associating cigarettes with a sense of carefree belonging is reassuring to adolescents at a time of identity construction when social relations are extremely important and teens often feel awkward in social situations.

* * * *

4. "*Tobacco use is the norm.*" By associating tobacco use with commonplace activities, events, social spaces, or mind-sets, advertising reassures users that smoking and chewing are normal, pervasive, and socially acceptable. Advertising links tobacco consumption to routine social activities and transition points in the daily work-play cycle.

* * * *

5. "*Tobacco use is safe and healthful.*"

* * * *

In ads, tobacco use is associated with healthy, outdoor activities, leaving the impression that tobacco use is not only safe but the choice of healthy, vigorous people. Healthiness has been a manifest theme in cigarette ads for at least 60 years.

Images of healthy smokers offer reassurance to would-be quitters.

* * * *

Many of the participants in this ongoing debate seem to assume that a definitive finding of causality is a necessary predicate for legislative action restricting tobacco promotion and advertising. In the Committee's view, however, requiring definitive proof of causality on issues of this nature would unjustifiably stymie sensible public health regulation. Indeed, the history of public health successes, from vaccination to cholera prevention and injury control, suggest that detailed causal understanding is apt to *follow* and intervention, rather than be a precondition for it. If youth smoking fell *after* advertising and promotion were eliminated, this would corroborate a hypothesis for which there is already ample, suggestive evidence–that such advertising and promotion is an important factor in the initiation of tobacco use by youths. This seems to be the lesson from the experiences reviewed in the New Zealand report.

The inability to conduct case control studies in an environment free of tobacco marketing makes it impossible to discern the independent causal effect of advertising and promotion on tobacco consumption.

* * * *

Indeed, when one takes into account the inherent difficulty of discerning a causal influence, the substantial convergent evidence that advertising and promotion increases tobacco use by youths is impressive and, in the Committee's view, provides a strong basis for legal regulation.

Having said this, the Committee does not think that the argument for restricting the advertising and promotion of tobacco products must rest on a definitive or unequivocal finding that such activities causally influence levels of

consumption. It is enough that the advertising and promotional activities described above in this chapter have the natural tendency to encourage initiation and maintenance of smoking by children and adolescents. There can be no doubt that the tobacco companies aim to portray smoking in a favorable light and to communicate messages that link use of tobacco products to positive feelings, images, and experiences. Even if the primary objective of those marketing expenditures is to preserve or expand market share among existing smokers, youngsters are routinely exposed to messages that encourage them to smoke.

* * * *

[Reprinted, with corrections, July 1994]

Preventing Tobacco Use Among Young People

A Report of the Surgeon General

* * * *

Development of the Report

This report of the Surgeon General was prepared by the Office on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention, Public Health Service, U.S. Department of Health and Human Services, as part of the department's responsibility, under Public Law 91-222 and Public Law 99-252, to report current information on the health effects of cigarette smoking and smokeless tobacco use to the United States Congress. This report is the first to focus on the problem of tobacco use among young people.

* * * *

The current report has been produced through the efforts of experts in the medical, pharmacologic, epidemiologic, developmental, economic, behavioral, legal, and public health aspects of smoking and smokeless tobacco use among young people.

* * * *

Major Conclusions

1. Nearly all first use of tobacco occurs before high school graduation; this finding suggests that if adolescents can be kept tobacco-free, most will never start using tobacco.

2. Most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so; they experience relapse rates and withdrawal symptoms similar to those reported by adults.

3. Tobacco is often the first drug used by those young people who use alcohol, marijuana, and other drugs.

4. Adolescents with lower levels of school achievement, with fewer skills to resist pervasive influences to use tobacco, with friends who use tobacco, and with lower self-images are more likely than their peers to use tobacco.

5. Cigarette advertising appears to increase young people's risk of smoking by affecting their perceptions of the pervasiveness, image, and function of smoking.

6. Communitywide efforts that include tobacco tax increases, enforcement of minors' access laws, youth-oriented mass media campaigns, and school-based tobacco-use prevention programs are successful in reducing adolescent use of tobacco.

Summary

Introduction

The health effects of cigarette smoking have been the subject of intensive investigation since the 1950s. Cigarette smoking is still considered the chief preventable cause of premature disease and death in the United States. As was documented extensively in previous Surgeon General's reports, cigarette smoking has been causally liked to lung cancer and other fatal malignancies, atherosclerosis and coronary heart disease, chronic obstructive pulmonary disease, and other conditions that constitute a wide array of serious health consequences (USDHHS 1989). More recent studies have concluded that passive (or involuntary) smoking can cause disease, including lung cancer, in healthy nonsmokers. In 1986, an advisory committee appointed by the Surgeon General released a special report on the health consequences of smokeless tobacco, concluding that smokeless tobacco use can cause cancer and can lead to nicotine addition (USDHHS 1986). In the 1988 report, nicotine was designated a highly

addictive substance, comparable in its physiological and psychological properties to other addictive substances of abuse (USDHHS 1988).

Considerable evidence indicates that the health problems associated with smoking are a function of the duration (years) and the intensity (amount) of use. The younger one begins to smoke, the more likely one is to be a current smoker as an adult. Earlier onset of cigarette smoking and smokeless tobacco use provides more life-years to use tobacco and thereby increases the potential duration of use and the risk of a range of more serious health consequences. Earlier onset is also associated with heavier use; those who begin to use tobacco as younger adolescents are among the heaviest users in adolescence and adulthood. Heavier users are more likely to experience tobacco-related health problems and are the laeast likely to quit smoking cigarettes or using smokeless tobacco. Preventing tobacco use among young people is therefore likely to affect both duration and intensity of total use of tobacco, potentially reducing long-term health consequences significantly.

Health Consequences of Tobacco Use Among Young People

Active smoking by young people is associated with significant health problems during childhood and adolescence and with increased risk factors for health problems in adulthood. Cigarette smoking during adolescence appears to reduce the rate of lung growth and the level of maximum lung function that can be achieved. Young smokers are likely to be less physically fit than young nonsmokers; fitness levels are inversely related to the duration and the intensity of smoking. Adolescent smokers report that they are significantly more likely than their nonsmoking peers to experience shortness of breath, coughing spells, phlegm production, wheezing, and overall diminished physical health. Cigarette smoking during childhood and adolescence poses a clear risk of respiratory

symptoms and problems during adolescence; these health problems are risk factors for other chronic conditions in adulthood, including chronic obstructive pulmonary disease.

Cardiovascular disease is the leading cause of death among adults in the United States. Atherosclerosis, however, may begin in childhood and become clinically significant by young adulthood. Cigarette smoking has been shown to be a primary risk factor for coronary heart disease, arteriosclerotic peripheral vascular disease, and stroke. Smoking by children and adolescents is associated with an increased risk of early atherosclerotic lesions and increased risk factors for cardiovascular diseases. These risk factors include increased levels of low-density lipoprotein cholesterol, increased very-low-density lipoprotein cholesterol, increased triglycerides, and reduced levels of high-density lipoprotein cholesterol. If sustained into adulthood, these patterns significantly increase the risk for early development of cardiovascular disease.

Smokeless tobacco use is associated with health consequences that range from halitosis to severe health problems such as various forms of oral cancer. Use of smokeless tobacco by young people is associated with early indicators of adult health consequences, including periodontal degeneration, soft tissue lesions, and general systemic alterations. Previous reports have documented that smokeless tobacco use is as addictive for young people as it is for adults. Another concern is that smokeless tobacco users are more likely than nonusers to become cigarette smokers.

Among addictive behaviors such as the use of alcohol and other drugs, cigarette smoking is most likely to become established during adolescence. Young people who begin to smoke at an earlier age are more likely than later starters to develop long-term nicotine addiction. Most young people who smoke regularly are already addicted to nicotine, and they experience this addiction in a manner and severity similar to what adult smokers experience. Most adolescent smokers

report that they would like to quit smoking and that they have made numerous, usually unsuccessful attempts to quit. Many adolescents say that they intend to quit in the future and yet prove unable to do so. Those who try to quit smoking report withdrawal symptoms similar to those reported by adults. Adolescents are difficult to recruit for formal cessation programs, and when enrolled, are difficult to retain in the programs. Success rates in adolescent cessation programs tend to be quite low, both in absolute terms and relative to control conditions.

* * * *

The Epidemiology of Tobacco Use Among Young People

* * * *

How adolescents perceive their social environment may be a stronger influence on behavior than the actual environment. For example, adolescents consistently overestimate the number of young people and adults who smoke. Those with the highest overestimates are more likely to become smokers than are those with more accurate perceptions. Similarly, those who perceive that cigarettes are easily accessible and generally available are more likely to begin smoking than are those who perceive more difficulty in obtaining cigarettes.

Behavioral factors figure heavily during adolescence, a period of multiple transitions to physical maturation, to a coherent sense of self, and to emotional independence. Adolescents are thus particularly vulnerable to a range of hazardous behaviors and activities, including tobacco use, that may seem to assist in these transitions. Young people who report that smoking serves positive functions or is potentially useful are at increased risk for smoking. These functions are associated with bonding with peers, being independent and mature, and having a positive social image. Since reports from adolescents who begin to smoke indicate that they have lower self-esteem and lower self-images than their non-smoking

peers, smoking can become a self-enhancement mechanism. Similarly, not having the confidence to be able to resist peer offers of tobacco seems to be an important risk factor for initiation. Intentions to use tobacco and actual experimentation also strongly predict subsequent regular use.

The positive functions that many young people attribute to smoking are the same functions advanced in most cigarette advertising. Young people are a strategically important market for the tobacco industry. Since most smokers try their first cigarette before age 18, young people are the chief source of new consumers for the tobacco industry, which each year must replace the many consumers who quit smoking and the many who die from smoking-related diseases. Despite restrictions on tobacco marketing, children and adolescents continue to be exposed to cigarette advertising and promotional activities, and young people report considerable familiarity with many cigarette advertisements. In the past, this exposure was accomplished by radio and television programs sponsored by the cigarette industry. Barred since 1971 from using broadcast media, the tobacco industry increasingly relies on promotional activities, including sponsorship of sports events and public entertainment, outdoor billboards, point-of-purchase displays, and the distribution of specialty items that appeal to the young. Cigarette advertisements in the print media persist; these messages have become increasingly less informational, replacing words with images to portray the attractiveness and function of smoking. Cigarette advertising frequently uses human models or human-life cartoon characters to display images of youthful activities, independence, healthfulness, and adventure-seeking. In presenting attractive images of smokers, cigarette advertisements appear to stimulate some adolescents who have relatively low self-images to adopt smoking as a way to improve their own self-image. Cigarette advertising also appears to affect adolescents' perceptions of the pervasiveness of smoking, images of smokers, and the function of smoking. Since these perceptions are psychosocial risk factors for the

initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.

Efforts to Prevent the Onset of Tobacco Use

Most of the U.S. public strongly favors policies that might prevent tobacco use among young people. These policies include mandated tobacco education in schools, a complete ban on smoking by anyone on school grounds, further restrictions on tobacco advertising and promotional activities, stronger prohibitions on the sale of tobacco products to minors, and increases in earmarked taxes on tobacco products. Interventions to prevent initiation among young people—even actions that involve restrictions on adult smoking or increased taxes—have received strong support among smoking and nonsmoking adults.

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A crucial element of prevention is access: adolescents should not be able to purchase tobacco products in their communities. Active enforcement of age-at-sale policies by public officials and community members appears necessary to prevent minors' access to tobacco. Communities that have adopted tighter restrictions have achieved reductions in purchases by minors. At the state and national levels, price increases have significantly reduced cigarette smoking; the young have been at least as responsive as adults to these price changes. Maintaining higher real prices of cigarettes provides a barrier to adolescent tobacco use but depends on further tax increases to offset the effects of inflation. The results of this review thus suggest that a coordinated, multicomponent campaign involving policy changes, taxation, mass media, and behavioral education can effectively reduce the onset of tobacco use among adolescents.

Summary

Smoking and smokeless tobacco use are almost always initiated and established in adolescence. Besides its long-term effects on adults, tobacco use produces specific health problems for adolescents. Since nicotine addiction also occurs during adolescence, adolescent tobacco users are likely to become adult tobacco users. Smoking and smokeless tobacco use are associated with other problem behaviors and occur early in the sequence of these behaviors. The outcomes of adolescent smoking and smokeless tobacco use continue to be of great public health importance, since one out of three U.S. adolescents uses tobacco by age 18. The social environment of adolescents, including the functions, meanings, and images of smoking that are conveyed through cigarette advertising, sets the stage for adolescents to begin using tobacco. As tobacco products are available and as peers begin to try them, these factors become personalized and relevant, and tobacco use may begin. This process most affects adolescents who, compared with their peers, have lower self-esteem and self-images, are less involved with school and academic achievement, have fewer skills to resist the offers of peers, and come from homes with lower socioeconomic status. Tobacco-use prevention programs that target the larger social environment of adolescents are both efficacious and warranted.

Chapter Conclusions

Following are the specific conclusions for each chapter of this report:

Chapter 2. The Health Consequences of Tobacco Use by Young People

1. Cigarette smoking during childhood and adolescence produces significant health problems among young people, including cough and phlegm production, an increased number and severity of respiratory illnesses, decreased physical fitness, an unfavorable lipid profile, and potential

retardation in the rate of lung growth and the level of maximum lung function.

2. Among addictive behaviors, cigarette smoking is the one most likely to become established during adolescence. People who begin to smoke at an early age are more likely to develop severe levels of nicotine addiction than those who start at a later age.

3. Tobacco use is associated with alcohol and illicit drug use and is generally the first drug used by young people who enter a sequence of drug use that can include tobacco, alcohol, marijuana, and harder drugs.

4. Smokeless tobacco use by adolescents is associated with early indicators of periodontal degeneration and with lesions in the oral soft tissue. Adolescent smokeless tobacco users are more likely than nonusers to become cigarette smokers.

Chapter 3. Epidemiology of Tobacco Use Among Young People in the United States

1. Tobacco use primarily begins in early adolescence, typically by age 16; almost all first use occurs before the time of high school graduation.

2. Smoking prevalence among adolescents declined sharply in the 1970s, but the decline slowed significantly in the 1980s. At least 3.1 million adolescents and 25 percent of 17- and 18-year-olds are current smokers.

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4. Many adolescent smokers are addicted to cigarettes; these young smokers report withdrawal symptoms similar to those reported by adults.

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Chapter 4. Psychosocial Risk Factors for Initiating Tobacco Use

1. The initiation and development of tobacco use among children and adolescents progresses in five stages: from forming attitudes and beliefs about tobacco, to trying, experimenting with, and regularly using tobacco, to being addicted. This process generally takes about three years.

2. Sociodemographic factors associated with the onset of tobacco use include being an adolescent from a family with low socioeconomic status.

3. Environmental risk factors for tobacco use include accessibility and availability of tobacco products, perceptions by adolescents that tobacco use is normative, peers' and siblings' use and approval of tobacco use, and lack of parental support and involvement as adolescents face the challenges of growing up.

4. Behavioral risk factors for tobacco use include low levels of academic achievement and school involvement, lack of skills required to resist influences to use tobacco, and experimentation with any tobacco product.

5. Personal risk factors for tobacco use include a lower self-image and lower self-esteem than peers, the belief that tobacco use is functional, and lack of self-efficacy in the ability to refuse offers to use tobacco. For smokeless tobacco use, insufficient knowledge of the health consequences is also a factor.

Chapter 5. Tobacco Advertising and Promotional Activities

1. Young people continue to be a strategically important market for the tobacco industry.

2. Young people are currently exposed to cigarette messages through print media (including outdoor billboards) and

through promotional activities, such as sponsorship of sporting events and public entertainment, point-of-sale displays, and distribution of specialty items.

3. Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey independence, healthfulness, adventure-seeking, and youthful activities—themes correlated with psychosocial factors that appeal to young people.

4. Cigarette advertisements capitalize on the disparity between an ideal and actual self-image and imply that smoking may close the gap.

5. Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.

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Self-Regulatory Cigarette Advertising Codes

In 1965, the tobacco industry began creating self-regulatory cigarette advertising and promotional codes (U.S. Congress 1965).

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The National Association of Broadcasters Code Authority, which reviewed all advertisements under the self-regulatory process, noted that the volume and character of cigarette advertising were likely to influence the young and were therefore still problematic. In a confidential report, the association expressed its concern:

> Despite changes which have been brought about in cigarette advertising on radio and television, the cumulative

impression created by virtually all of the individual campaigns supports a finding that smoking is made to appear universally acceptable, attractive and desirable. . . . The difficulty in cigarette advertising is that commercials which have an impact upon an adult cannot be assumed to leave unaffected a young viewer, smoker or otherwise. The adult world depicted in cigarette advertising very often is a world to which the adolescent aspires. The cowboy and the steelworker are symbols of a mature masculinity toward which he strives. Popularity, romantic attachment and success are also particularly desirable achievements for the young. To the young, smoking indeed may seem to be an important step towards, and a help in growth from adolescence to, maturity (National Association of Broadcasters 1966, pp. 30-1).

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Historical Perspectives on the Effectiveness of Cigarette Advertising

The role of cigarette advertising in attracting new smokers was easier to recognize in the days when the rate of recruitment exceeded the rate of death and quitting so that total cigarette sales grew. Comments from diverse sources credited cigarette advertising for expanding sales and accelerating market-broadening social trends such as smoking among women. This acknowledgment of cigarette advertising's effects on demand and onset was commented on in articles by academic analysts, advertising agents and journals, the tobacco trade press, and tobacco executives themselves.

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One analyst who annually evaluated the cigarette industry noted that the industry is a "glowing testimonial to the power of advertising. . . . These particular companies have not only out-spent but also have out-earned any other[s]. . . . [T]he

tobacco tycoons . . . are loudest in their praise for the part that advertising has played." (Wootten 1941, p. 5). *Business Week* (1953a) commented that "cigarettes offer the classic case . . . of how a mass-production industry is built on advertising" (p. 66).

Advertising Professionals

Printers' Ink, the leading advertising trade journal of its day, noted in 1930 that sales success already demonstrated "the one feature which has contributed more than any other single factor to the enormous growth of the cigarette industry—advertising" (Tennant 1971, p. 137). This opinion was upheld by the sales performance of cigarettes during the Great Depression: "The growth of cigarette consumption has, itself, been due largely to heavy advertising expenditure. . . . It would be hard to find an industry that better illustrates the economic value of advertising in increasing consumption of a commodity. . . . There can be no doubt but that steady advertising pressure has been a dominating force in increasing cigarette consumption among both men and women" (Weld 1937, pp. 70-2).

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One of the agency executives who had worked on the Marlboro account with Leo Burnett later wrote: "I don't think cigarettes ought to be advertised. . . . [W]hen all the garbage is stripped away, successful cigarette advertising involves showing the kind of people most people would like to be, doing the things most people would like to do, and smoking up a storm. I don't know any way of doing this that doesn't tempt young people to smoke, and, in view of my present knowledge, this is something I prefer not to do" (Daniels 1974, p. 245).

More recently, the late Emerson Foote, a founder of Foote, Cone and Belding and more recently a member of McCann-Erikson, ridiculed the industry claims that its advertising only affects brand switching and has no effect whatsoever on

recruitment: "I don't think anyone really believes this. . . . I suspect that creating a positive climate of social acceptability for smoking, which encourages new smokers to join the market, is of greater importance to the industry. . . . In recent years, the cigarette industry has been artfully maintaining that cigarette advertising has nothing to do with total sales. Take my word for it, this is complete and utter nonsense" (Foote 1981, pp. 1667-8).

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The *United States Tobacco Journal*

The *United States Tobacco Journal*'s frequent and unabashed comments on the power of advertising became something of an editorial litany during the 1950s and early 1960s. In 1953 the journal observed that "advertising, in the hands of manufacturers of tobacco products, has become a powerful tool for the construction of the massive edifice of this industry" (*USTJ* 1953, p. 4). After the industry rebounded from the reports during the early 1950s of a tobacco-cancer link, the journal stated, "There is no obstacle to large-scale sales of tobacco products that cannot be surmounted by aggressive selling" (*USTJ* 1955a, p. 4) and elsewhere noted "the pivotal importance of advertising" (*USTJ* 1955b, p. 4). A year later, the journal could claim that "the effectiveness of current advertising by tobacco products manufacturers has been demonstrated repeatedly by the upward trend in sales volume that results there from" (*USTJ* 1956, p. 4).

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By 1963, the ever-increasing spending on cigarette advertising and promotion led the journal to declare: "The money invested by the tobacco industry in various forms of advertising and promotion essentially reflects the industry's faith in the effectiveness of advertising as a vital sales-building tool. This faith appears justified by the continued annual rise in sales of cigarettes in this country" (USTJ 1963c, p. 4).

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From a perspective two decades after the 1964 Surgeon General's report, the official history of the R.J. Reynolds Company comments that "the company's advertising expenditures and those of its major rivals were extraordinary, reflecting the apparent agreement on the necessity of large-scale advertising to fuel expansion" (Tilley 1985, p. 330).

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The "Maturity" of the Cigarette Market

As a spokesperson for the cigarette industry has argued in a congressional hearing (Ward 1989), the industry considers itself to be operating in a "mature" market—mature because the growth in this market has slowed over the past two decades and because the product being marketed is well known to consumers. This theoretical concept of a mature market is drawn from the "product life cycle," an analogy to the stages of biological development from birth to death. The application of this theory to the cigarette industry hinges on the belief that markets develop in predictable stages and that these stages govern the intent of corporate behaviors, such as advertising and promotion. It has been asserted before congressional hearings, for example, that "in 'mature' markets such as the one for tobacco products, awareness of the product is universal. The function of advertising in a 'mature' market is to promote brand loyalty or brand switching" (Ward 1989, p. 304). The argument continues that the tobacco industry has no strategic interest in youthful nonsmokers because "advertising cannot influence a nonuser to begin using the product category: (Ward 1989, p. 306).

Few studies have specifically examined how the product life cycle applies to the cigarette industry. One early study written in support of the concept defined three substages of market maturity. Of 33 cigarette brands examined, only 36 percent of them were classified into any of the three mature stages, in

contrast with 56 percent of health care and personal care products and 60 percent of food products (Polli and Cook 1969). A few years later, two research directors from the J. Walter Thompson advertising agency reviewed this study and others and counseled readers of the *Harvard Business Review*: "Most writers present the [product life cycle] concept in qualitative terms, in the form of idealization without empirical backing. Also, they fail to draw a clear distinction between product class (e.g., cigarettes), product form (e.g., filter cigarettes), and brand (e.g., Winston). But, for our purposes, this does not matter. We shall see that it is not possible to validate the model at any of these levels of aggregation" (Dhalla and Yuspeh 1976, p. 103).

Advertising textbooks counsel that even when faced with so-called mature markets, advertising firms can and often should attempt both to increase usage among existing customers and to address potential new users. For example, one leading textbook makes it clear that product maturity by no means rules out the capacity—or the need—to attract new users:

> Product class maturity is typified by a slowdown of growth and a fairly constant level of sales. This means that competition may become very intense because any brand can only increase its sales by taking them from a competitor or by developing new uses, users, or changing the product. . . . The brand's objectives during maturity are to defend its position, take share from the competition, promote new uses and users, and support the retailer. . . . In addition, the advertising should stress new uses, new users, and new usage occasions in an attempt to increase overall sales of the product class (Rothschild 1987, p. 105).

It appears that no matter what the appropriate classification of the product, different classes of potential consumers will still exist as market segments with different and particular circumstances. Marketing will thus have to address these

individual segments—including that of young people for whom the product and brands are less well known, and for whom appeal must be created, since cigarettes are not a necessity of life.

Perhaps the strongest indicator that cigarette manufacturers, despite their assertions about encouraging brand switching and fostering brand loyalty, must seek out large numbers of new consumers stems from a striking feature of this mature market. The noted "slow-down" over the past two decades reflects the substantial attrition that has occurred among the industry's consumers: since 1964, about 44 million Americans have quit smoking (CDC 1993), and approximately 9 million more have died of tobacco-related disease (Tye, Warner, Glantz 1987). For the cigarette industry to preserve its mature—that is, slowing in growth but not yet declining—U.S. market status, it must attract some two million new smokers each year to replace these lost consumers. To reach this market of potential new smokers, the industry must earmark a large proportion of the $4 billion annually spent on advertising and promotional activities. As is shown through epidemiologic data in Chapters 3 (see "Age or Grade When Smoking Begins") and 4 (see "Sociodemographic Factors in the Initiation of Smoking") of this report, these new smokers will primarily be adolescents. These potential young consumers have been shown to become aware of cigarettes, in part, through cigarette advertising (Chapman and Fitzgerald 1982; Aitken, Leathar, O'Hagan 1985); moreover, young people appear to develop brand loyalty early on (O'Connell et al. 1981), and because of the addictive properties of nicotine (discussed in Chapter 2), these young smokers are likely to continue into adulthood as cigarette consumers.

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Research on the Effects of Cigarette Advertising and Promotional Activities on Young People

Introduction

A substantial and growing body of scientific literature has reported on young people's awareness of, and attitudes about, cigarette advertising and promotional activities.[3] Research has also focused on the effects of these activities on psychosocial risk factors for beginning to smoke. Considered together, these studies offer a compelling argument for the mediated relationship of cigarette advertising and adolescent smoking. To date, however, no longitudinal study of the direct relationship of cigarette advertising to smoking initiation has been reported in the literature. This lack of definitive literature does not imply that a causal relationship does not exist; rather, better quantification of exposure, effect, and etiology is needed. Important data from research conducted for the tobacco industry are not available; such information would add considerably to our knowledge. A definitive study, such as a randomized control trial with young people exposed and not exposed to cigarette advertising, is both practically and ethically impossible. What is possible and needed is research that is longitudinal and multivariate, that takes advantage of recent statistical modeling methods, and that uses large samples of children and young adolescents who have not tried smoking and who have had relatively little exposure to cigarette advertising.

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Young People's Exposure to Cigarette Advertising

Several research studies show that young people are aware of, and respond to, cigarette advertising. In a recent Gallup (1992) study, 87 percent of the 1,125 adolescents surveyed nationwide could recall recently seeing one or more tobacco company advertisements. Similarly, Pierce et al. (1993) found in their study of nearly 7,000 California adolescents that over 90 percent of the 12- and 13-year-olds could name a brand they had seen advertised. Half of the adolescents in the Gallup

survey could identify the cigarette brand name associated with at least one of four cigarette slogans (Gallup 1992).

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Together, the results from these studies show that even relatively young children are aware of cigarette advertising and are able to recall particular advertisements. Older adolescents are moreover capable of interpreting the advertisements in imagistic terms related to attractive features of adult life.

Opinions on Cigarette Advertising and Smoking Behaviors

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Armstrong et al. (1990) conducted a large randomized trial among seventh-grade students (13 years old) in Western Australia in which peer-led and teacher-led programs concerning social influences were evaluated. When the students were resurveyed one year and two years after the intervention, the results identified factors associated with beginning to smoke. Both boys and girls who at baseline reported that cigarette advertisements made them think they would like to smoke a cigarette were significantly more likely to have adopted smoking at the one-year and two-year follow-up surveys than those who did not report feeling this way.

Aitken and Eadie (1990) examined whether the awareness and appreciation of cigarette advertisements were independent of other predictors of adolescent smoking. In this study, 868 Glasgow adolescents between the ages of 11 and 14 years were selected at random and interviewed privately in their homes. Older adolescents, boys, and current smokers in the sample tended to approve of cigarette advertisements and were also more likely to correctly identify cigarette advertisements that carried no brand identification. In general, smokers were more successful than nonsmokers at identifying cigarette advertisements, were more likely to have siblings who smoked, tended to be more approving of cigarette advertisements, and

were less likely to perceive that their parents strongly opposed smoking. These findings suggest that advertising may reinforce the habit of smoking, even among new, young smokers.

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Young People's Self-Image and Implications for Tobacco Use

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The image attributions of adolescents described in this set of studies suggests a mechanism of smoking initiation (Figure 3). The visual images in advertisements may thus serve to shape the ideal self-image of this impressionable audience, since the ads may portray attributes that children and adolescents would like to have. The greater the discrepancy between their self-images and their ideal self-images, the more likely these young people are to try to make their self-images more like their ideal self-images (e.g., by "buying into" an improved self-image through responding with the purchase invited by the ads).

In commercial advertising theory, this notion informs imagery-advertising conceptualization, which presumes that the need for consistency or balance will motivate an individual to try to close the gap between self-image and ideal self-image. (McGuire 1989). This conceptualization entails an active striving to make the self-image more like the ideal self-image, and not the other way around. Imagery-advertising conceptualization is most compatible with identification theories (e.g., role theories, reference-group theories, and self-presentation theories) that stress the need to expand identity by adopting distinctive thoughts, feelings, or actions (McGuire 1989). Thus, the teenaged girl who responds to a Virginia Slims advertisement that portrays independence is motivated to buy and use the product in order to enhance her sense of independence.

Young People's Misperceptions of Smoking Prevalence and Implications for Tobacco Use

In contrast to the image-advertising model described above, the model in Figure 4 is not concerned with the content of cigarette advertisements, but instead with the pervasiveness of the ads. According to this conceptualization, the pervasiveness of cigarette ads leads youth to overestimate the prevalence of smoking and to consider smoking as normative. Studies have consistently reported that adolescents overestimate the prevalence of cigarette smoking (Johnson 1982; Chassin et al. 1984); moreover, those who smoke overestimate smoking prevalence to a greater extent than do nonsmokers (Sherman et al. 1983; McCarthy and Gritz 1984). Overestimating smoking prevalence has been found to be among the strongest predictors of smoking initiation and acquisition (Chassin et al. 1984; Collins et al. 1987; Sussman et al. 1988; see "Perceived Environmental Factors" for smoking in Chapter 4).

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Discussion

Even though the tobacco industry asserts that the sole purpose of advertising and promotional activities is to maintain and potentially increase market shares of adult consumers, it appears that some young people are recruited to smoking by brand advertising. Two sources of epidemiologic data support this assertion. Adolescents consistently smoke the most advertised brands of cigarettes, both in the United States and elsewhere (McCarthy and Gritz 1984; Baker et al. 1987; DiFranza et al. 1991). Moreover, following the introduction of advertisements that appeal to young people, the prevalence of use of those brands—or even the prevalence of smoking altogether—increases. This association was seen among adolescent females after the 1968 introduction of the Virginia Slims brand; smoking prevalence among adolescent females nearly doubled between 1968 (8 percent) and 1974 (15

percent) (USDHHS 1980). A similar associated increase was seen for smokeless tobacco use among adolescent males after a major advertising and promotional campaign in the 1970s focused on "beginners" (Tye, Warner, Glantz 1987). More recently, Camel's Old Joe advertising campaign appears to have substantially increased the brand's market share among persons less than 18 years old (DiFranza et al. 1991).

Advertising and promotional activities also appear to influence risk factors for adolescent tobacco use, even if this is not the intention of the tobacco industry. These psychosocial risk factors—having a low self-image, attributing positive meanings or benefits to smoking, and perceiving smoking as prevalent and normative—strongly predict smoking intentions and smoking onset.

In several countries, concern about health consequences of smoking and the potential influence of advertising on consumption has prompted a nationwide ban on tobacco advertising (UK Department of Health 1992). In 1975, Norway banned all tobacco advertising, sponsorship, and indirect tobacco advertising. In 1977, Finland banned all forms of tobacco advertising. Canada introduced a ban in 1989 on all tobacco advertising, sponsorship, and indirect advertising of Canadian origin. New Zealand introduced a ban in December 1990 on advertising in print media originating in New Zealand, on advertising in posters, and on sponsorship of sports. Although the bans in Canada and New Zealand have been relatively recent, the current evidence indicates that these actions have had a significant effect on consumption in each of the four countries (UK Department of Health 1992). In each case, the banning of advertising was followed by a decrease in smoking rates that persisted even when controlled by changes in other factors, such as price. These studies focused on total cigarette consumption; although the bans appear to have influenced smoking rates among young people in Canada and

Norway, more specific data concerning young people are forthcoming.

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Morbidity and Mortality Weekly Report

August 19, 1994

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Changes in the Cigarette Brand Preferences of Adolescent Smokers -- United States, 1989-1993

Approximately three million U.S. adolescents are smokers, and they smoke nearly one billion packs of cigarettes each year (1). The average age at which smokers try their first cigarette is 14½ years, and approximately 70% of smokers become regular smokers by age 18 years (2). Evaluating the changes in the brand preferences of young smokers can help identify factors that influence adolescents' brand choice and may suggest smoking-prevention strategies (3,4). This report examines changes in the brand preferences of teenaged smokers from 1989 to 1993 using data from CDC's 1993 Teenage Attitudes and Practices Survey (TAPS-II) and comparing them with data from the 1989 TAPS.

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TAPS and TAPS-II indicate that brand preference is more tightly concentrated among adolescents than among adults. In both surveys, at least 85% of adolescent current smokers purchased one of three brands (i.e., Marlboro, Camel, or Newport); however, the three most commonly purchased brands among all smokers accounted for only 35% of the overall market share in 1993.

The three most commonly purchased brands among adolescent smokers were the three most heavily advertised brands in 1993 (7), suggesting that cigarette advertising influences adolescents' brand preference. In 1993, Marlboro, Camel, and Newport ranked first, second, and third (7), respectively, in advertising expenditures. However, Camel and Newport ranked seventh and fifth, respectively, in overall market share (8).

Morbidity and Mortality Weekly Report

July 20, 1995

Trends in Smoking Initiation Among Adolescents and Young Adults -- United States, 1980-1989

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The increase in rates of smoking initiation among adolescents during 1985-1989 may reflect increased real expenditures for cigarette advertising and promotion. The increase in rates occurred during a period when real expenditures for total cigarette advertising and promotion** doubled, and expenditures for cigarette promotion more than quadrupled (7) (Figure 2): from 1980 to 1989, total annual advertising and promotional expenditures (in 1993 dollars) increased from $2.1 billion to $4.2 billion, while promotional expenditures alone increased from $771 million (37% of total expenditures) to $3.2 billion (76%) (Figure 2). Promotional efforts have been highly effective among adolescents. For example, among persons aged 12-17 years in 1992, approximately 50% of smokers and 25% of nonsmokers reported having received promotional items from tobacco companies (1).

An association between overall cigarette marketing expenditures and initiation rates for smoking among adolescents is plausible for at least four reasons. First, brand loyalty is usually established with the first cigarette smoked (8); therefore, cigarette companies have an economic incentive to encourage first-time smokers to smoke their brands. Second, adolescents are exposed to cigarette advertising and promotions that employ themes and images that appeal to young persons (1). Third, advertising directly influences brand awareness and attitudes toward smoking among adolescents (1). Specifically, adolescents smoke the most heavily advertised brands, and changes in brand preferences among young persons are associated with changes in brand-specific advertising expenditures (9). For example, the Joe Camel campaign

introduced nationally in 1988 was associated with an increase in the market share of that specific brand among adolescents (1,9). Finally, consumer research suggests that younger persons (i.e., aged 14-17 years) aspire to be young adults (10); therefore, advertising and promotional efforts targeted toward young adults may have greater appeal to adolescents because of their age aspirations.

Although current estimates of smoking initiation rates among adolescents are not available, from 1991 through 1993, the national prevalence of smoking increased among eighth- and 10th-grade students (6). To reverse the trend of increasing smoking initiation rates among adolescents and to achieve the national health objective for the year 2000 of reducing the initiation of cigarette smoking by youth (no more than 15% should become regular smokers by age 20) (objective 3.5) (4), prevention efforts that focus on young persons should be intensified. Such efforts could include making cigarettes less affordable by either increasing their real price (1) or by limiting sales to cartons rather than individual packs, enforcing laws prohibiting the sale and distribution of cigarettes to young persons (4), conducting mass media campaigns to discourage tobacco use (1), and eliminating or severely restricting all forms of tobacco product advertising and promotion to which young persons are likely to be exposed (4).

Friday

August 11, 1995

Part V

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 801, et al.

Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents; Proposed Rule Analysis Regarding FDA's Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products; Notice

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I. Introduction

Approximately 50 million Americans currently smoke cigarettes and another 6 million use smokeless tobacco products.[1] These tobacco products are responsible for more than 400,000 deaths each year due to cancer, respiratory illnesses, heart disease, and other health problems.[2] Cigarettes kill more Americans each year than acquired immune deficiency syndrome (AIDS), alcohol, car accidents, murders, suicides, illegal drugs, and fires combined.[3] On average, smokers who die from a disease caused by smoking lose 12 to 15 years of life because of tobacco use.[4]

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To determine the most appropriate regulatory measures, the agency reviewed the current patterns of use of tobacco products. According to the 1994 Surgeon General's Report, "Preventing Tobacco Use Among Young People: A Report of the Surgeon General" (the 1994 Surgeon General's Report), more than 3 million American adolescents currently smoke cigarettes and an additional 1 million adolescent males use

smokeless tobacco.[7] Every day, another 3,000 young people become regular smokers.[8] U.S. data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely to ever begin.[9] Eighty-two percent of adults who ever smoked had their first cigarette before age 18, and more than half of them had already become regular smokers by that age.[10] Moreover, the younger one beings to smoke, the more likely one is to become a heavy smoker.[11]

Many young tobacco users become addicted to nicotine, a chemical substance in tobacco. Although they believe that they will not become addicted to nicotine or become long-term users of tobacco products, they often find themselves unable to quit smoking.[12] In fact, among smokers aged 12-17 years. 70 percent already regret their decision to smoke and 66 percent state that they want to quit.[13] Those who are able to quit experience relapse rates and withdrawal symptoms similar to those reported in adults.[14]

Long-term addiction to nicotine can result in serious chronic diseases and premature death. An adolescent whose cigarette use continues into adulthood increases his or her risk of dying from cancer, cardiovascular disease, or lung disease.[15] In addition, smokeless tobacco use has been linked to oral cancer and other adverse effects.[16]

Although most segments of the American adult population have decreased their use of cigarettes, the prevalence of smoking by young people has failed to decline for more than a decade. Recently, smoking among young people has begun to rise.[17] Between 1991 and 1994, the prevalence of smoking by eighth graders increased 30 percent, from 14.3 percent to 18.6 percent. Among 10th grade students, it increased from 20.8 percent to 25.4 percent and for 12th grade students, it rose from 28.3 percent to 31.2 percent.[18] Between 1985 and 1994, smoking among college freshmen increased from 9 percent to 12.5 percent.[19]

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Tobacco products are among the most heavily advertised products in the United States.[22] In 1993, the tobacco industry spend a total of $6.2 billion on the advertising, promotion, and marketing of cigarettes and smokeless tobacco. Of that number, 31 percent ($1.9 billion) was spent on advertising and promotional activities; 26 percent ($1.6 billion) was given to retailers in the form of cash allowances or retailer items to facilitate and enhance the sale of tobacco products, and finally, 43 percent ($2.6 billion) was in the form of financial incentives (e.g. coupons, cents off, buy one/get one free, free samples) to consumers.[23]

Tobacco product brand names, logos, and advertising messages are pervasive, appearing on billboards, on buses and trains, in magazines and newspapers, and on clothing and other goods. These ubiquitous images and messages convey to young people that tobacco use is desirable, socially acceptable, safe, healthy, and prevalent in society. One study found that 30 percent of 3 years olds and 91 percent of six year olds associate the "Joe Camel" cartoon figure with cigarettes.[24] Studies also show that most young people buy the most heavily advertised cigarette brands, whereas many adults buy generic or "value category" cigarette brands, which have little or no image advertising.[25]

* * * *

A. Sale and Distribution

The proposed rule would restrict the sale of cigarettes and smokeless tobacco products to individuals age 18 and older. This age restriction is based on the fact that most adult smokers became regular smokers before age 18.

The proposed rule would require retailers to verify the age of persons who wish to buy cigarettes or smokeless tobacco products and would eliminate "impersonal" methods of sale

that do not readily allow age verification, such as mail orders, self-service displays, and vending machines.

The proposed rule would make each manufacturer, distributor, and retailer of tobacco products responsible for complying with the proposed restrictions. Manufacturers would be required to remove all manufacturer-supplied or manufacturer-owned self-service displays, advertising, labeling, and other items that do not conform to the requirements in the proposed rule.

The proposed rule would prohibit the distribution of free samples and would allow the exchange of coupons and other non-cash certificates only by individuals 18 or older and only in face-to-face transactions. Currently, young people, including children in elementary school, are often able to obtain free samples despite industry-imposed age restrictions on such distributions.

The proposed rule would also prohibit the sale of single cigarettes ("loosies") and "kiddie packs (less than 20 to a pack) which, due to their relatively low price and easy concealment, have been shown to be particularly appealing to children and adolescents.

Further, the proposed rule would prohibit manufacturers from using a trade name or brand name of a non-tobacco product for a cigarette or smokeless tobacco product. This will prevent a manufacturer from transferring the images, good will, and appeal of a popular non-tobacco product to a tobacco product.

* * * *

II. Cigarette and Smokeless Tobacco Product Use Among Children and Adolescents

Each year, the cigarette industry loses about 1.7 million customers in the United States; about 400,000 die from diseases caused by their smoking and another 1.3 million quit

smoking.[1] To offset the sales lost to smokers who die or quit smoking, cigarette manufacturers rely on young people as the primary source of new customers. Each day, approximately 3,000 young people become regular smokers,[2] serving as the industry's major domestic source of replacement smokers.

* * * *

The long-term downward trend in adult smoking contrasts with the trends in smoking among young people. The Institute of Medicine notes that the number of high school seniors who have smoked in the last 30 days remained "basically unchanged since 1980," at approximately 30 percent, and further reported that 16.7 percent of 8th grade students were current smokers (that is, had smoked within the past 30 days), and 8.3 percent smoked daily.[9] The prevalence of cigarette smoking in recent years among 8th and 10th grade students has risen significantly and provides cause for great concern. For example, among 8th grade students, 14.3 percent in 1991 and 18.6 percent in 1994 were current smokers; among 10th grade students, 20.8 percent in 1991 and 25.4 percent in 1994 were current smokers.[10]

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Approximately 3 million children under the age of 18 are daily smokers.[15]

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In 1970, the prevalence of snuff use among males was lowest in those 17 to 19 years of age and the highest use was by men aged 50 or more. By 1985, a dramatic shift had occurred, and males between 16 and 19 were twice as likely to use snuff as men aged 50 and over.[22]

* * * *

The recent and very large increase in the use of smokeless tobacco products by young people and the addictive nature of

these products has persuaded the agency that these products must be included in any regulatory approach that is designed to help prevent future generations of young people from becoming addicted to nicotine-containing tobacco products.

B. The Health Effects Associated With Cigarettes and Smokeless Tobacco Products

Over 400,000 Americans die each year from smoking-related illnesses. This equates to more than one of every five deaths in the United States.[31] If an adolescent's tobacco use continues for a lifetime, there is a 50 percent chance that the person will die prematurely as a direct result of smoking."[32] Moreover, the earlier a young person' smoking habit begins, the more likely he or she will become a heavy smoker and therefore suffer a greater risk of smoking related diseases.[33] Smoking is responsible for about 30 percent of all cancer deaths,[34] including 87 percent of all lung cancer deaths; 82 percent of deaths from chronic obstructive pulmonary disease (COPD);[35] 21 percent of deaths from coronary heart disease;[36] and 18 percent of deaths from stroke.[37] Further, a causal relationship exists between cigarette smoking and cancers of the larynx, mouth, esophagus, and bladder; and atherosclerotic peripheral vascular disease, cerebrovascular disease (stroke), and low-birth weight babies.[38] Cigarette smoking is also a probable cause of infertility and peptic ulcer disease and contributes to, or is associated with, cancers of the pancreas, kidney, cervix, and stomach.[39]

* * * *

2. Health Effects of Smokeless Tobacco Products

Smokeless tobacco use can cause oral cancer.[90] The risk of oral cancer increases with increased exposures to smokeless tobacco products, particularly in those areas of the mouth where smokeless tobacco products are used.[91] The risk of cheek and gum cancers is nearly 50 times greater in long-term snuff users than in nonusers.[92] Snuff and chewing tobacco

contain potent carcinogens, including nitrosamines, polynuclear aromatic hydrocarbons, and radioactive polonium.[93]

* * * *

Smokeless tobacco use causes oral cancer and oral leukoplakia and may be associated with an increased risk of cancer of the esophagus.

* * * *

2. Advertising, Labeling, and Adolescents

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Adolescents view cigarettes as a symbol to be used in helping to create a desired self image and to communicate that image to others. Cigarette advertising reinforces this symbolism and links smoking to success, social acceptance, sophistication, and a desirable lifestyle. The rugged and masculine Marlboro Man conveying, in the words of the Chief Executive Officer and President of Philip Morris, "elements of adventure, freedom, being in charge of your own destiny,"[109] and the cool Joe Camel, giving humorous dating tips, provide imagery that adolescents can accept as identifying badges. Not surprisingly, these brands are among the most popular with young people.

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With regard to smokeless tobacco products, the U.S. Tobacco Company (UST) successfully revived a declining market by targeting young people, especially young men, in its promotion and advertising. In 1970, the segment of the population with the highest use of these products was men over age 50, and young males were among the lowest. Fifteen years later, there had been a 10-fold increase in the use of smokeless tobacco products among young males, whose use was double that of men over age 50.[127]

* * * *

4. Empirical Research on the Effects of Cigarette Advertising Activities on Young People

* * * *

a. *Studies of advertising recall, approval of advertising, and young people's response to advertising.* Many studies have shown that young people are aware of, respond favorably to, and are influenced by cigarette advertising.[149] Even relatively young children are aware of cigarette advertisements and can recall salient portions. A recent Gallup survey found that 87 percent of adolescents surveyed could recall seeing one or more tobacco advertisements and that half could identify the brand name associated with one of our popular cigarette slogans.[150] One study found that over 34 percent of 12- to 13-year old California children surveyed could name a brand of cigarettes that was advertised, despite the fact that Federal law bans cigarette and smokeless tobacco product advertising on both radio and television, the usual medium of information for children and adolescents.[151]

* * * *

Other studies relating children's misperceptions about the prevalence of smoking to advertising exposure and smoking status have found that overestimating smoking prevalence appears to be a very strong predictor of smoking initiation and progression to regular smoking.[158] The 1994 Surgeon General's Report found that young people overestimate the prevalence of cigarette[159] smoking and that advertising's pervasiveness plays a role in this misconception.

* * * *

Overestimating smoking prevalence, as well as self-reported exposure to advertising, have both been positively correlated with the intention to smoke.[162]

Additional evidence indicates that children smoke many fewer brands than adults and that their choices, unlike adults,

are directly related to the amount and kind of advertising.[163] CDC recently reported that 86 percent of underage smokers who purchase their own cigarettes purchase one of three brands: Marlboro (60 percent), Camel (13.3 percent) and Newport (12.7 percent).[164] These three brands were also the three most heavily advertised brands in 1993.[165] While Marlboro has long been the most popular brand among young people, Camel's share of the youth market increased from around 3 percent to 13.3 percent as a result of the invigorated Joe Camel campaign.

* * * *

b. *The effect of selected advertising campaigns, which were effective with children.*

* * * *

One study explored the power of the Joe Camel campaign to penetrate the youth market. The study found that children as young as 3 years old could identify Joe Camel as a symbol for smoking. This recognition ranged from 30 percent of 3 year olds, to 91 percent of 6 year olds. In fact, the recognition rates for Joe Camel surpassed the rates for certain children's products, cereals, computers, and network television symbols.[168] A similar study funded by R.J. Reynolds found that 72 percent of 6 year olds and 52 percent of children between the ages of 3 and 6 could identify Joe Camel. These rates exceeded the recognition rates for Ronald McDonald, which were 62 percent of the 6 year olds and 51 percent of children between the ages of 3 and 6.[169] The higher recognition rates for Joe Camel are remarkable because, unlike Ronald McDonald who appears in television commercials during children's viewing hours, Federal law prohibits cigarette advertisements on television.

Data collected by researchers for the State of California found that in 1990, 23.1 percent of the under age 18 market in California purchased Camel as their brand. This represented a

230 percent increase over its pre-"Joe Camel" 1986 rate. The same growth rate did not occur for adults.[170] Nationally, Camel had less than 3 percent of the youth market before the brand was repositioned in 1988 and Joe Camel was introduced.[171] By 1989, Camel's share of the youth market had risen to 8.1 percent,[172] and by 1992, 13 to 16 percent.[173] During this same period, Camel's share of the adult market barely moved from its 4 percent level.[174]

The other American study used data from the National Health Interview Survey to study trends in smoking initiation among 10- to 20-year olds from 1944 through 1980. The study found that initiation rates for 18- to 20-year-old women peaked in the early 1960's and steadily declined thereafter. Initiation rates for girls under 18, however, increased abruptly around 1967. This was the same period when brands specifically intended for women were introduced and heavily advertised. The initiation rate was particularly steep for women who did not attend college. The initiation rate for girls under the age of 18 peaked in 1973 -- about the same time that sales for these brands (Virginia Slims, Silva Thins, and Eve) peaked. Between 1967 and 1973, smoking initiation rates increased around 110 percent for 12-year old girls, 55 percent for 13-year olds, 70 percent for 14-year olds, 75 percent for 15-year olds, 55 percent for 16-year olds, and 35 percent for 17-year olds.[175]

* * * *

5. Summary of Evidence

The agency concludes that the preponderance of quantitative and qualitative studies of cigarette advertising suggests: (1) A causal relationship between advertising and youth smoking behavior, and (2) a positive effect of stringent advertising measures on smoking rates and on youth smoking. Moreover, industry statements indicated the importance of the youth market segment to the industry's continued success.

Actions taken by industry members to attract young smokers have also resulted in attracting children and adolescents. Finally, examples of specific campaigns directed at young people support the hypothesis that cigarette advertising and promotion play an important role in encouraging young people to start smoking, to sustain their smoking habit, and to increase consumption. Therefore, the agency finds that stringent restrictions on advertising are essential if smoking by adolescents is to be reduced.

* * * *

3. Reduced Incidence of New Young Tobacco Users

Each year, an estimated 1 million youngsters become new smokers. The proposed regulation targets this group by restricting youth access to tobacco products and by limiting advertising activities that affect adolescents. Several communities have demonstrated that access restrictions are extremely effective when vigorously applied. Woodridge, IL, for example, achieved a compliance rate of over 95 percent. Moreover, 2 years after that law was enacted, a survey of 12 to 14 year-old students indicated that overall smoking rates were down by over 50 percent (over ⅔ for regular smokers).[14]

* * * *

The proposed advertising and promotional restrictions would augment these efforts to limit the attraction of tobacco products to underage consumers. As discussed in detail in the preamble above, no one study has definitively quantified the precise impact of advertising or of advertising restrictions. Nevertheless, the majority of the relevant research indicates that advertising restrictions would reduce consumer demand. For example, according to the 1989 report of the Surgeon General, "The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and logical evidence makes it more likely than not that advertising and promotional activities do

stimulate cigarette consumption."[15] Similarly, after a careful examination of available studies, Clive Smee, Chief Economic Adviser to the UK Department of Health determined that, "the balance of evidence thus supports the conclusion that advertising does have a positive effect on consumption."[16]

* * * *

August 28, 1996

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 801, et al.

Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents; Final Rule

* * * *

To effectively address the death and disease caused by tobacco products, addiction to cigarettes and smokeless tobacco must be eliminated or substantially reduced. The evidence demonstrates that this can be achieved only by preventing children and adolescents from starting to use tobacco. Most people who suffer the adverse health consequences of using cigarettes and smokeless tobacco begin their use before they reach the age of 18, an age when they are not prepared for, or equipped to, make a decision that, for many, will have lifelong consequences. These young people do not fully understand the serious health risks of these products or do not believe that those risks apply to them. They are also very impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the tobacco industry, techniques that associate the use of tobacco products with excitement, glamour, and independence. When cigarette and smokeless tobacco use by children and adolescents results in addiction, as it so often does, these youths lose their freedom to choose whether or not to use the products as adults.

* * * *

An adolescent whose cigarette use continues into adulthood increases his or her risk of dying from cancer, cardiovascular disease, or lung disease.[15] Moreover, the earlier a young person's smoking habit begins, the more likely he or

she will become a heavy smoker and therefore suffer a greater risk of diseases caused by smoking.[16] Approximately one out of every three young people who became regular smokers each day will die prematurely as a result.[17]

Similar problems exist with underage use of smokeless tobacco. As stated in the 1995 proposed rule, the market for smokeless tobacco has shifted dramatically toward young people since 1970 (60 FR 41314 at 41317). School-based surveys in 1991 estimated that 19.2 percent of 9th to 12th-grade boys use smokeless tobacco.[18] Among high school seniors who had ever tried smokeless tobacco, 73 percent did so by the 9th grade.[19]

As long as children and adolescents become addicted to cigarette and smokeless tobacco use in these numbers, there is little chance that society will be able reduce the toll of tobacco-related illnesses. If, however, the number of children and adolescents who begin tobacco use can be substantially diminished, tobacco-related illness can be correspondingly reduced because data suggest that anyone who does not begin smoking in childhood or adolescence is unlikely to ever begin.[20]

* * * *

Evidence in the administrative record demonstrates that the most effective way to achieve such a reduction is by limiting the access to, and attractiveness of, cigarettes and smokeless tobacco to young people.

* * * *

E. Definitions (§897.3)

Proposed §897.3 would have contained definitions for the terms "cigarette," "cigarette tobacco," "distributor," "manufacturer," "nicotine," "package," "point of sale," "retailer," and "smokeless tobacco." The agency received several comments on the definition section of the proposal, regarding either the specific definitions provided or requesting

definitions for additional terms. In response to the comments, the agency has clarified several terms, including "distributor" and "retailer," and has modified the term "cigarette" to exclude little cigars.

Proposed §897.3(a)(3) would have provided a definition of "cigarette" which included the following language, modeled after the definition of "little cigar" contained in the Cigarette act:

(a) Cigarette means * * *

(3) [a]ny roll of tobacco wrapped in leaf tobacco or any substance containing tobacco * * * and as to which 1,000 units weigh not more that 3 pounds.

(20) Several comments supported the inclusion of "little cigars" in the definition of "cigarette" and suggested that the definition be broadened to include other tobacco products as well. These comments argued that all tobacco, including "snuff," chewing tobacco, cigars, and pipes, should be regulated in the same manner as cigarettes, as these products are also nicotine delivery systems. These comments further stated that there is evidence to show that cigar smoking is becoming increasingly popular among young adults and adolescents.

In contrast, several comments from industry indicated that little cigars are unique products which should not be regulated as cigarettes. One comment stated that the agency has no studies to support the inclusion of little cigars in the rule. Moreover, the U.S. Treasury Department's Bureau of Alcohol, Tobacco and Firearms (BATF) submitted a comment opposing the inclusion of little cigars in the "cigarette" definition, as this would require little cigars to be labeled and advertised as a cigarette under the FDA regulations, but taxed and labeled as a "cigar," under the Internal Revenue regulations enforced by BATF.

The agency has decided, based upon the comments and the record of this proceeding, not to include little cigars in the definition of "cigarettes" for the purposes of the regulation. The differences between little cigars and cigarettes are significant—the products are easily distinguishable, taxed at different levels, and marketed to different consumers. Moreover, little cigars are neither advertised extensively nor sold in vending machines. Most importantly, the agency is not currently aware of sufficient evidence of use of little cigars by children or adolescents to support inclusion of such products in the rule. Therefore, FDA has deleted little cigars from the definition of "cigarette" in §897.3(a). Moreover, FDA will continue to coordinate definitions with BATF as appropriate.

* * * *

VI. Advertising

A. Subpart D—Restrictions on Advertising and Labeling Tobacco Products

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The purpose of the advertising regulations is to decrease young people's use of tobacco products by ensuring that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people.

* * * *

B. The Need for Advertising Restrictions

In the preamble to the proposed 1995 rule, FDA tentatively asserted that a preponderance of the quantitative and qualitative studies of cigarette advertising suggested: (1) A causal relationship between tobacco advertising and tobacco use by young people, and (2) a positive effect of stringent advertising measures on smoking rates and on youth tobacco use. In arriving at this tentative finding, FDA relied heavily on

the National Academy of Sciences Institute of Medicine's (IOM's) Report entitled *Growing Up Tobacco Free, Preventing Nicotine Addiction in Children and Youths*, Washington, DC 1994 (the IOM Report) and the Department of Health and Human Services' (DHHS') Center for Disease Control and Prevention's (CDC's) Report entitled *Preventing Tobacco Use Among Young People, A Report of the Surgeon General* (1994) (1994 SGR). Both indicated that advertising was an important factor in young people's tobacco use, and that restrictions on advertising must be part of any meaningful approach to reducing smoking and smokeless tobacco use among young people. In addition, FDA was careful to note that industry statements and actions and examples of youth oriented advertising and marketing campaigns lent support to the agency's findings.

FDA's review and consideration of the comments received has led the agency to conclude that advertising plays a material role in the decision by those under 18 to use tobacco products.

* * * *

D. Evidence Supporting FDA's Advertising Restrictions

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FDA agrees that none of these studies individually is sufficient to: (1) Establish that advertising has an effect of directly causing minors to use tobacco products; (2) determine directionality—that is, did advertising cause the observed effect, or are smokers more observant of advertising (the Klitzner, Aitken, et al., and Alexander studies attempted to control for this effect); or (3) define terms or disprove the influence of peer pressure in smoking behavior.

However, none of these defects is sufficient to render it inappropriate for FDA to use the studies as evidence. The studies, in fact, present useful insight into how advertising affects smoking behavior and when considered with other

studies provide sufficient support for the agency's conclusion. For example, one study [101] stated that the results show that part of the process of becoming a smoker is to adopt a preferred brand, which the advertising and tobacco industries concede is affected by advertising. Moreover, these studies clearly indicate that, at a minimum, advertising plays an important role in developing an appealing and memorable image for brands. Finally, FDA recognizes that advertising may not be the most important factor in a child's decision to smoke; however, the studies cited by the agency establish that it is a substantial, contributing, and therefore material, factor.

* * * *

It should also be noted that the apparent focus on the possible causal role of cigarette and smokeless tobacco advertising in young people's *initial* decision to smoke or to use smokeless tobacco is overly narrow. Human behavior cannot be modeled so simplistically. In point of fact, tobacco advertising has an effect on young people's tobacco use behavior if it affects initiation, maintenance, or attempts at quitting.

The evidence that FDA has gathered in this proceeding establishes that cigarette and smokeless tobacco advertising does have such an effect. While not all the evidence in the record supports this conclusion, there is more than adequate evidence, that when considered together, supports a conclusion that advertising, with the knowledge of the industry, does affect the smoking behavior and tobacco use of people under the age of 18. This behavior includes the decision whether to start using cigarettes or smokeless tobacco, whether to continue using or to increase ones consumption, when and where it is proper to use tobacco, and whether to quit. This evidence includes:

Expert Opinion - The American Psychological Association provided expert opinion, with specific citation to numerous

studies, to show that tobacco advertising plays directly to the factors that are central to children and adolescents and thus plays an important role in their decision to use tobacco. (See section VI.D.4.a. of this document; and 60 FR 41314 at 41329.)

Advertising Theory - Basic advertising and consumer psychology theory, statements from advertising experts, and general consumer testing show that advertising that is multi-media, that uses color, and that employs more pictures, characters, or cartoons as opposed to text is more robust and can be better processed, understood and remembered by children and adolescents, who have less information processing ability than adults. (See section VI.B1. and VI.B2 of this document.)

Studies and Surveys - Studies show that children are exposed to substantial and unavoidable advertising, that exposure to tobacco advertising leads to favorable beliefs about tobacco use, that advertising plays a role in leading young people to overestimate the prevalence of tobacco use, and that these factors are related to young people's tobacco initiation and use. (See sections VI.D.3.a., VI.D.3.b., and VI.D.3.c. of this document.)

Empirical Studies - Studies conducted on sales data have shown that advertising did increase one segment of the tobacco market (low tar cigarettes), that advertising in New Zealand had the effect of increasing tobacco sales to young people, and that a large multi-country survey showed that advertising tends to increase consumption of tobacco products. (See 60 FR 41314 at 41333 through 41334; sections VI.D.3.g., VI.D.4.c., and VI.D.6.a. of this document)

Anecdotal Evidence, and Various Advertising Campaigns Successful with Young People - Studies show that the buying behavior of young people is influenced by advertising, that they smoke the most advertised brands, that children ages 3 to 6 can

recognize a cartoon character associated with smoking at the same rate as they recognize Ronald McDonald, that various ad campaigns (Camel cigarettes, Reg cigarettes, products designed for women, and smokeless tobacco advertising aimed at new users) that appeared to be targeted to young people did have an effect upon young people's purchases and use of tobacco, and that young people report that they got their information about a tobacco brand from billboards, magazines, in store advertising and on teeshirts (60 FR 41314 at 41329 through 41334; and see sections VI.D.3.d., VI.D.3.e., and VI.D.3.i. of this document).

Industry Statements - Statements in documents created by R.J. Reynolds' researchers, by Philip Morris advertising people, by executives of US Tobacco and by people in and doing work for various Canadian tobacco companies indicate that young people are an important and often crucial segment of the tobacco market.

Consensus Reports - The IOM and 1994 SGR concluded on the basis of an exhaustive review of the evidence that advertising affects young people's perceptions of the pervasiveness, image and function of smoking, that misperceptions in these areas constitute psychosocial risk factors for the initiation of tobacco use, and thus advertising appears to increase young people's risk of tobacco use.

* * * *

Thus, the evidence in this proceeding demonstrates that cigarette and smokeless tobacco advertising plays a material role in the decision of children and adolescents under the age of 18 to engage in tobacco use behavior. It therefore establishes that the harm from this advertising is real.

* * * *

FDA agrees with those comments that expressed the view that labeling the tobacco market as a "mature market" is a

simplistic denotation, which fails to recognize the movement into the market each day of new young smokers often motivated in part by advertising. Even "mature" markets must replenish their customer base as older consumers leave the market. In fact, approximately one million new young smokers enter the tobacco market each year. These new smokers are necessary to keep the mature market stable and to prevent decline. There is no evidence to suggest that these new smokers are predestined[182] to enter the market. RJR acknowledged this in one marketing memo,

> "[I]f we are to attract the nonsmoker or the presmoker, there is nothing in this type of product that he would currently understand or desire. * * * Instead, we somehow must convince him with wholly irrational reasons that he should try smoking."[183]

They must be influenced by peers, parents, and advertising, either to join the market or to decline to enter.

The agency finds that regardless of whether marketers and their advertising agencies intentionally target children and adolescents, young people are still affected by advertising. Children are not isolated from tobacco advertising's attractiveness or inducements. There is no "magic curtain around children and teenagers who seek to learn how to fit into the adult world," nor is there any evidence to support a claim that young people are immune from advertising's blandishments.[184]

Comments asserting that tobacco advertising fails to increase consumption for the tobacco market run contrary to the views of one well-known advertising executive who stated:

I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every other product, somehow miraculously fails to work for tobacco products.[185]

Further, the view that advertising does not affect consumption is contradicted by industry experience, logic, and evidence. It does not appear credible that the industry spends more than $6 billion annually merely to maintain brand share and to try to switch current smokers; this argument defies common sense. The economics of this argument are strained - five manufacturers control almost 100 percent of the market, and three of these have approximately 90 percent of the market.[186]

* * * *

In addition to logic, there is empirical evidence that advertising can expand demand in a so-called mature market and in fact has done so in the cigarette market before. Smoking rates for teenage girls rose from 8.4 percent in 1968, when major promotional campaigns first targeted women, to 15.3 percent in 1974, by which time other tobacco companies had also begun marketing women's brands.[188] The same phenomenon was captured differently in a recent study[189] that tracked initiation rates for girls and women over a 40-year period. The study found that smoking initiation rates rose for girls under 18 during the period between 1967 and 1973 (women's targeting period), even though initiation rates did not rise for women 18 and older. Finally, as detailed more fully in the preamble to the 1995 proposed rule (60 FR 41314 at 41345), another study looked at the effect of variations in advertising expenditures for low tar cigarettes. Although the advertising did not increase the advertiser's brand share, increased advertising for low tar cigarettes caused the entire market for cigarettes to increase.[190]

* * * *

Finally, even the industry acknowledges that young people are a strategically important audience because brand loyalty often develops during this period of trying cigarettes and becoming a smoker. In 1973, RJR's research and development

officer wrote "Realistically, if our Company is to survive and prosper over the long term, we must get our share of the youth market."[194] And, as noted in the preamble of the 1995 proposed rule, these words reflect those uttered by the Canadian sister company of the American tobacco company, Brown and Williamson Tobacco Corp.

If the last ten years have taught us anything, it is that the industry is dominated by the companies who respond most effectively to the needs of younger smokers.[195]

FDA finds that there is no merit to the industry's claim that because the tobacco market is a mature market, advertising does not stimulate demand but only reallocates the existing market between companies. Not only is the industry's argument overly simplistic, but, as shown, advertising plays an important role in creating new customers, including young people. FDA shares the incredulity expressed by the court in *Dunagin*, 718 F.2d at 750, regarding this argument: "It is beyond our ability to understand" why an industry would spend billions a year merely to acquire market share at the expense of its competitors, when it has a much harder job of convincing young people to start a habit that is neither easy to acquire nor pleasant.

* * * *

5. Section 897.30(b) - Billboards

The agency proposed in § 897.30(b) to prohibit outdoor advertising, including but not limited to billboards, posters, or placards, placed within 1,000 feet of any public playground or playground in a public park, elementary school, or secondary school. FDA proposed this provision because these are places where children and adolescents spend a great deal of time and should therefore be free of advertising for these products. The agency tentatively concluded that this was a reasonable restriction and noted that the cigarette industry's voluntary "Cigarette Advertising and Promotion Code," (the Code)

revised in 1990, contains a similar provision concerning schools and playgrounds (60 FR 41314 at 41334 through 41335).

* * * *

Moreover, the agency also disagrees that it has no basis for including other outdoor signage, including signs on stores, in the regulation. The agency provided evidence in the administrative record and comments refer to evidence,[203] which showed that in a test area, those stores within 1,000 feet of schools had a significantly greater percentage of windows covered with tobacco signs than those further away. Moreover, the two RJR memoranda by sales representatives, described in section VI.D.3.d. of this document, mention the importance of supplying stores near high schools with "young adult" material.

This provides sufficient support for the agency's concern with signage on stores near schools. Young people are more likely to frequent stores near schools, especially older adolescents, and these venues should therefore be free of advertising for tobacco products.

* * * *

The agency is aware that the Code of Advertising Practices has not been uniformly observed, as several comments pointed out. Moreover, the industry code is significantly less inclusive than the proposed regulation as it covers only billboard advertising and not other forms of outdoor advertising such as posters and placards. These other forms are likely to be placed near retail establishments and in some cases, according to comments, have appeared on school fences. The agency finds that all outdoor advertising must be included in the regulation in order to provide comprehensive coverage. There is little difference between a billboard and a large poster to a child. Both are advertisements, and both are visible, so that children see them as they go to and from school and play.

In addition, the Code prohibits outdoor advertising only within 500 feet of schools, an area only a block or a block and a half from the school (there are 10 to 12 city blocks to a mile). One block will not provide sufficient protection as it would not cover the areas where many children congregate with their friends. Moreover, a child's vision does not stop at one block from school. A prohibition of 1,000 feet will ensure the absence of signs for 2 to 3 blocks from a school or playground which can be seen from these locations where children spend a significant amount of time each day.

* * * *

Billboards near schools and playgrounds ensure that children are exposed to their messages for a prolonged period of time. As the Supreme Court recognized in *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1934), billboards are seen without the exercise of choice or volition, and viewers have the message thrust upon them by all the arts and devices that skill can produce. This is particularly true of billboards that are readily visible (i.e. within 1,000 feet) when children play or study at a playground or school, places where by design children spend a lot of time, or when children walk to and from a school or playground. Confronted daily and unavoidably with the advertised message, even in text-only, a child gets a sense of familiarity, normalcy and acceptability of the message and the product that is advertised.

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The 1,000-foot restriction on outdoor advertising will serve to remove what has been shown is an effective means for tobacco companies to communicate with young people in a direct and unavoidable manner. Eliminating such billboards will thus mean eliminating a means by which the industry has influenced young people to engage in tobacco use behavior.

Therefore, the agency concludes that § 897.30(b) is a necessary part of its effort to reduce underage use of tobacco products.

* * * *

[1998]

SMOKING AND TOBACCO CONTROL

MONOGRAPH 9

National Institute of Health
National Cancer Institute

Cigars Health Effects and Trends

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Cigar Smoking: Overview and Current State of the Science

David M. Burns

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TRENDS IN CONSUMPTION

Since 1993, cigar sales in the U.S. have increased by almost 50%, with the largest increase occurring in sales of large cigars (USDA 1997).

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Marketing approaches to cigar sales linking cigar smoking to wealth and success as portrayed in magazines such as *Cigar Aficionado*, and utilizing events such as cigar nights at popular restaurants, gained widespread prominence beginning in 1992. Sales of cigars, particularly large cigars, have increased substantially since that time. Accompanying this marketing has been the suggestion that cigars particularly premium cigars, have minimal if any disease risk associated with their use as long as they are used in "moderation" (Shanken 1997).

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ADOLESCENT USE

Data on cigar use among adolescents is also alarming (Chapter 2). Few data on past adolescent cigar use are

available, largely because it was a behavior felt to be uncommon enough not to be worthy of examination until recently. However, several recent surveys of adolescents show a substantial fraction of both male and female adolescents who report both ever and current use of cigars (CDC 1997a, Chapter 2). Male cigar smoking prevalence still exceeds that for females among adolescents, but the gender difference is less than for adults. Table 2 presents the prevalence of cigar use among adolescents in Massachusetts by educational grade level, and it is clear that there is a substantial level of cigar use, even prior to high school.

Addiction to nicotine is a process that occurs almost exclusively during adolescence and young adulthood (USDHHS 1994). The age of initiation of cigar smoking, prior to the recent increase in cigar use, was much older than that for cigarette smoking (Chapter 2); and this difference in age of initiation may be partially responsible for the lower addictive potential of cigars, as manifest by the high rate of occasional, as compared to daily, cigar smoking among adults. Now that initiation of cigar smoking is common among adolescents, whatever resistance to addiction is offered by an older age of initiation would be expected to disappear. The reassurance provided by the low rate of daily cigar smoking among adults may be illusionary now that initiation of cigar smoking is extending into those age groups where development of addiction to nicotine is common. Several generations of adolescents have become addicted to tobacco products that allow nicotine to be absorbed through the lung (cigarettes) and to tobacco products that allow nicotine to be absorbed through the oral mucosa (smokeless tobacco). Cigars can deliver nicotine through both of these routes, and large numbers of adolescents are currently being exposed to nicotine through use of cigars. It is premature to conclude that current generations of adolescents who are ingesting nicotine from cigars will not become addicted simply because older generations of cigar

smokers, who began smoking as adults, were less likely to become addicted.

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Table 2

Prevalence of cigar use in the last year, and all forms of tobacco use in the last 30 days by school grade, Massachusetts, 1996

	Grade						
	6	**7**	**8**	**9**	**10**	**11**	**12**
Past Year Use of Cigars	5.0 (4.2-5.8)	8.3 (6.6-10.0)	20.3 (17.7-22.9)	20.6 (18.1-23.1)	29.6 (26.9-32.3)	31.8 (28.7-34.8)	31.3 (28.2-34.4)
Past 30-Day Use of Cigars	2.0 (1.1-2.9)	4.4 (1.3-7.5)	10.9 (8.9-12.9)	10.4 (8.5-12.3)	16.0 (13.8-18.2)	18.4 (15.9-20.9)	13.4 (11.0-15.8)

MARKETING

Recent marketing efforts have promoted cigars as symbols of a luxuriant and successful lifestyle. Endorsements by celebrities including athletes, elaborate cigar smoking events and the resurgence of cigar smoking in movies have all contributed to the increased visibility of cigar smoking in society and probably have lowered barriers to cigar use in public. Publication of cigar lifestyle magazines such as "Cigar Aficionado", which began in 1992, antedate the increase in cigar consumption which began in 1993.

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Evaluation of the effects of cigar promotional efforts on adolescent cigar smoking is only just beginning due to the recent nature of this phenomenon, but cigars are not the first tobacco product to be heavily promoted in ways likely to influence adolescent use. Celebrity endorsements by popular heroes, including athletes, were a prominent part of the mass marketing of cigarettes during the first half of this century (Kluger 1996).

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CONCLUSIONS

1. Cigar use began to increase in the United States after promotional activities for cigars increased beginning in 1992.
2. Promotional activities for cigars have increased the visibility of cigar consumption, normalized cigar use, and broken down barriers to cigar use.
3. Although the use of sex and celebrity to sell cigarettes has been forbidden by the cigarette industry's voluntary code since 1965, these appeals are a regular feature of cigar marketing.

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CONCLUSIONS

1. Regular cigar smoking causes cancer of the lung, oral cavity, larynx, esophagus, and probably cancer of the pancreas.

2. Heavy cigar smokers, and those who inhale deeply, are at increased risk for coronary heart disease and can develop chronic obstructive pulmonary disease (COPD). Data from CPS-I suggest that cigar smokers have an increased risk for aortic aneurysm.

3. On average, cigar smokers are less likely to inhale cigar smoke than are cigarette smokers to inhale cigarette smoke, and this reduced inhalation of tobacco smoke probably explains the lower risks of coronary heart disease, COPD, and lung cancer seen among cigar smokers compared to cigarette smokers.

4. The risks of cancers of the oral cavity, and esophagus are similar among cigarette and cigar smokers, probably due to the similar doses of tobacco smoke delivered to these areas by smoking cigars and cigarettes.

5. Former cigarette smokers who currently smoke cigars are more likely to inhale deeply than cigar smokers who have never smoked cigarettes, and their risks are intermediate between cigarette smokers and cigar smokers who have never smoked cigarettes.

6. Cigarette smokers who switch to smoking only cigars have lung cancer risks that are lower than continuing cigarette smokers, but these risks appear to be substantially greater than those for individuals who have quit smoking all tobbaco products.

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Marketing and Promotion of Cigars

John Slade

INTRODUCTION

This chapter examines the recent commercial history of cigars in the United States. Sales patterns, advertising, and apparent promotional activities are explored. Most of the discussion of marketing activities is descriptive, since few quantitative data are available. There is almost no publicly available information on how the increased visibility that cigars have achieved since about 1992 has been financed. Accordingly, what are described in this chapter as promotional activities are not necessarily the result of activities by commercial interests. They are, though, activities that have probably contributed to the promotion of cigar consumption.

* * * *

There have been a marked increase in the number of smoke shops since 1992 (Flying High, 1997). The number of retail specialty tobacco outlets has increased from 2,358 in 1992 to 4,948 in 1996. A sign that this increase has drawn in many small businessmen who have not previously been involved in the trade is the publication of an extensive article in a trade magazine about the function of sales representatives (Scott, 1997).

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Lifestyle magazines

The resurgence of cigar use in the United States has been closely associated with the glossy lifestyle magazine, *Cigar Aficionado*, published by Marvin R. Shanken. Launched in the Fall of 1992, the magazine was targeted for what Shanken asserted was an increasing number of men who enjoy smoking expensive cigars (Shriver, 1992). The publication has grown from 130 pages per issue to more than 400 and has increased its publication frequency from four to six times annually. Its circulation has grown from 40,000 (Conrad, 1996) to 400,119 (*New York Times*, 1997. Each issue promotes cigar use as

part of successful, indulgent living through interviews with celebrities, sport stars, and others. Reviews of expensive cigars are offered as well as lavish descriptions of cigar accessories such as lighters and humidors. The editorial context is how to live life to the fullest in a style reminiscent of Esquire, GQ or Playboy. While advertising for cigars and their perquisites are prominent, sellers of upscale clothing, luxury cars, expensive watches, jewelry, premium liquor, casinos, other resorts, and perfume also feature their goods and services in this publication. Each issue has an article about gambling.

* * * *

Cigar-centered Dining and Entertainment

The current era of fancy cigar dinners and other entertainments focused on cigars seems to have begun around 1988 (Luz, 1997).

From its own beginnings four years later, *Cigar Aficionado* sponsored gala affairs and dinner parties at expensive restaurants featuring cigars, wines, and celebrity guests. Similar events, which build word of mouth advertising, have become widespread, and the magazine publicizes restaurants that offer "smoker nights." In a 1992 issue, there was a list of 32 domestic and 4 foreign restaurants and cigar clubs that offered such events (Smoker Nights, 1992); by Spring 1997, the number of listings had grown to 591 entries in the United States and 70 listings from outside the country (Smoker Nights, 1997). Magazine subscribers receive formal invitations to events sponsored by the magazine; and the magazine regularly features photographs from these events in its pages. The popularity and acceptability of these events is illustrated by the fact that a restaurant at Walt Disney World has hosted cigar dinners (Scott, 1996a).

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Newspaper stories about cigars

The resurgence in popularity of cigars has been covered, and in part fueled by, articles in newspapers. Among the twenty daily

newspapers indexed by the Dialog data base, there were 325 articles over the seven-year period 1990 - 1996 that dealt with news about cigars or feature stories about their increasing popularity in the culture. Coverage of cigars was fairly constant for the first 5 years of the period, and then showed an abrupt upswing (Table 8). Uncritical stories describing this as a social or as a fashion phenomenon have been common in newspapers as well as on television magazine shows. Much of this coverage was stimulated by a public-relations effort by cigar manufactures intended to promote positive stories in the news media linking cigar use to luxury and power (Klein, 1998).

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Additional information is needed to better characterize marketing efforts for cigars. Specifically, there should be:

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- Research to learn the extent to which advertising and promotion for cigars, including things as commonplace as cigar bands, reaches and affects kids.

Massachusetts Attorney General Scott Harshbarger Prepared Remarks Accepting National Tobacco Settlement

November 20, 1998

For some time now, I have been considering whether or not Massachusetts should agree to participate in a proposed national settlement of our tobacco litigation. Although the proposal is not all I had hoped for, I must weigh whether Massachusetts can do best by settling or whether we could achieve more by proceeding to trial.

It has been a tremendous gut-wrenching decision, but I have decided Massachusetts will agree to the terms of the proposed national settlement. I believe this settlement is in the best interest of the people of Massachusetts, and will provide tangible benefits to our state, to our children and to the public health for generations to come.

I believe we cannot do better at trial. In fact, we could do a great deal worse. There are serious limitations on what can be achieved through litigation, and it is important to remember that our lawsuit is one of only one of many weapons available in the war against Big Tobacco.

The benefits for Massachusetts under this agreement, include:

*$7.6 billion in the next 25 years, and roughly $300 million a year every year forever;

*Court-ordered, coast-to-coast restrictions against industry efforts to lure our children into becoming the next generation of tobacco victims through marketing, merchandising, and other means;

*An end to almost all outdoor advertising and mass transit advertising, and to Hollywood promotions that glamorize the use of tobacco products;

*A $1.5 billion national public education foundation to duplicate on a national scale the kind of tobacco counter-advertising that Massachusetts helped pioneer;

*And, a multi-million-dollar national charitable foundation to fight teen smoking and substance abuse, and to conduct research into the reduction of tobacco related disease.

Taken together, these provisions represent more than we could have achieved through trial. They are tangible and hard fought gains our state can begin to enjoy within a few months—instead of speculative benefits we might have been able to secure after a trial and years of inevitable appeals.

In short, if everything in this agreement was the end result of a trial, I would be more than happy to declare victory. That, in the final analysis, is the basis for my decision that accepting is in the best interest of the people of Massachusetts.

That does not mean that this settlement is ideal. It is not.

It is far short of what many of us who have fought this battle had hoped for, including the public health and tobacco control communities. Ideally, we would have liked fewer exceptions to the provisions of this deal. In a perfect world, we would have liked to regulate nicotine as a drug, make Big Tobacco responsible for reducing youth smoking rates, and put bigger and better warning labels on cigarettes.

I have fought hard for years to achieve those goals in local, state and federal forums, including in Congress. But I have to deal with reality and the facts before me, and to make judgments based on what I believe is in the best interests of the people of Massachusetts.

We must remember that this national settlement is an important and historic step forward in the war against Big Tobacco, but it is only the first step that we can and should take as a state and as nation. It certainly should not be used as an excuse to stop fighting for more for our children and for the public health on the local, state or federal level.

The fight must and will go on in Congress, in private lawsuits and in state houses and in communities here and across our nation.

As Attorney General, my overriding goals in our lawsuit have been to make the industry pay for the damage it has done to Massachusetts citizens, to protect our children and to improve the public health. The billions of dollars in this agreement for Massachusetts and the public health concession we have won are major steps toward the fulfillment of those goals.

To make the most of those gains, I am announcing today a proposal that the money won in this settlement be devoted exclusively to four key public health goals in Massachusetts to:

*Expand and improve health coverage for our children;
*Expand access to health care for working families;
*Supplement prescription drug and Medicare coverage for our senior citizens
*And, reduce tobacco use among children and adults, especially in minority and urban communities targeted by Big Tobacco.

I am proposing that a new expert commission composed of state officials and public health leaders be established to make specific, annual recommendations to the Legislature and the governor on how this significant revenue stream can be used in the best interest of the people and the public health of Massachusetts.

I will file specific legislation on these recommendations soon, and I hope the Legislature and the governor will act swiftly on my bill in the upcoming session.

As I said, this was probably one of the toughest decisions I have ever had to make as attorney general. I know that many of my friends in the public health and tobacco control communities will be disappointed.

But it is their rock-solid strength and dedication that helped me get to this point—a landmark that was unimaginable when we filed our longshot lawsuit two years and 11 months ago today. When it comes to issues of tobacco and tobacco control, the commitment of the public health community in Massachusetts is unequalled anywhere in our nation.

I know, beyond the shadow of a doubt, that they will make sure the funds won in this agreement are used to save lives.

I know that they will make their voices heard loud and clear every year when these funds are appropriated.

And I know that they will use their imaginations to make sure every penny is spent to significantly improve quality of life here, individually and collectively, for years to come.

From the bottom of my heart, I want to thank each and every one of them for their advice and counsel over the past few days and during my years as Attorney General. And I want to thank my trial team for their dedication and the magnificent job they have done, against all the odds, in the past three years.

Today, I am also announcing that, before I leave office in January, I will promulgate first-in-the-nation consumer protection regulations that will, among other things, limit the advertising of tobacco products in retail establishments within 1000 feet of schools.

I believe these regulations are absolutely necessary to close holes in the national agreement, and to do what we can to stop Big Tobacco from recruiting new customers among the children of Massachusetts.

And finally, I intend to join President Clinton's call for swift and decisive action on tobacco control by the new Congress, especially federal regulation of nicotine as a drug.

The reality is that in the year and a half since attorneys general first proposed to Congress a national settlement and a national tobacco control strategy, more than 1.5 million children have started smoking and more than a half million of them will die premature deaths as a result.

As a state and as a nation, we cannot and should not rest until we reverse that trend.

This settlement is an important and historic first step toward saving lives, protecting our children and creating a safer and healthier

future for citizens here and across our nation. I believe we have a responsibility to seize this opportunity for this generation and for generations to come.

(end)

OUTLINE OF TERMS FOR MASSACHUSETTS IN NATIONAL TOBACCO SETTLEMENT

OVERALL FINANCIAL TERMS

Massachusetts will receive a total of $7.6 billion in the first 25 years of the agreement, and $323 million a year every year forever beginning in the 26th year of the agreement.

ANNUAL PAYMENTS

After the agreement is finalized, Massachusetts will receive:

*An initial payment of $98 million early in 1999.
*$263 million in the year 2000.
*$284 million in 2001.
*$341 million in 2002.
*$344 million in 2003.
*$287 million in 2004 through 2007.
*$323 million in 2008 and every year thereafter.

USE OF FUNDS

The purposes for which the money could be used will be subject to legislative action. Attorney General Harshbarger is proposing the funds be earmarked to expand and improve health care for children, working adults and senior citizens, as well to reduce tobacco use in urban and minority communities.

PAYMENT PROVISOS

Payment will be adjusted annually based on inflation. The amount of annual payments will be subject to "volume adjustments," meaning that tobacco company payments will rise if cigarette sales increase, and fall if cigarette sales decrease.

MARKET SHARE & NON-PARTICIPATING MANUFACTURERS

If the aggregate market share of all companies participating in the agreement declines by more than 2 percent, their annual payment will be reduced by 3 percent for each percent lost beyond the 2 percent threshold.

This provision would not apply to states that pass legislation that requires non-participating manufacturers to pay money into a special state fund for future claims.

FEDERAL OFFSET

If before Nov. 30, 2002, Congress passes legislation that requires payments by the industry whether by tax or other means, the state's share of funds under this agreement could be reduced dollar for dollar by any portion of the federal funds made available to the state.

AREAS NOT COVERED BY THIS AGREEMENT

The agreement does not contain any restrictions on retailers. It does improve current Food & Drug Administration regulation of tobacco or nicotine. It does not contain so-called "look-back" penalties for industry failure to decrease youth smoking rates over time. It contains no restrictions on print advertising of tobacco products. It contains no improvements to the current health warnings on tobacco products.

YOUTH TARGETING

The agreement prohibits advertising, promotions or marketing that primarily target young people.

CARTOON CHARACTERS

The agreement bans the use of cartoons in the advertising, promotions, packaging, and labeling of tobacco products. It does not ban the use of human images for those purposes.

SPONSORSHIPS

Sponsorship of events with significant youth audiences will be prohibited, along with sponsorships of team sports and events where any participants are underage. For other events, tobacco companies will be limited to one brand name sponsorship per year.

Use of tobacco brand names for the naming of stadiums and arenas will be prohibited. Corporate sponsorships of athletic, musical, cultural, artistic or social events will be allowed as long as the corporate name does not include the brand name of the tobacco product.

OUTDOOR ADVERTISING

The agreement bans all outdoor advertising, including billboards, signs and placards in arenas, stadiums, and shopping malls. It limits advertising outside retail establishments to a size of 14 square feet.

All transit advertising of tobacco products would be banned.

PRODUCT PLACEMENT & THIRD PARTY USE

The agreement will ban payments to promote tobacco products in movies, television shows, theater productions, live or recorded music, performances, videos and video games.

Tobacco companies will be barred from using third parties to promote or advertise brand names in any way prohibited by the agreement.

The agreement also bans future cigarette brands from being named after recognized non-tobacco brand or trade names, or nationally recognized sports teams, entertainment groups or celebrities.

MERCHANDISE

The distribution and sale of apparel and merchandise with brand-name logos will be banned beginning July 1, 1999. Gifts will be banned without proof of age.

FREE SAMPLES & MINIMUM SIZE

Free samples will be restricted to adult-only establishments. Tobacco companies will be prohibited from opposing state legislation that would establish a minimum pack size of 20 until Jan. 1, 2002.

NATIONAL FOUNDATION

The agreement creates a national charitable foundation to reduce teen smoking and substance abuse, and to study ways to reduce tobacco-related disease. The tobacco industry will pay $250 million during the next 10 years to fund the foundation.

NATIONAL PUBLIC EDUCATION FUND

The agreement requires the tobacco industry to pay $1.45 billion during the next five years to create a national public education fund, which will carry out a national advertising and education program to counter youth tobacco use and educate consumers.

LOBBYING & LEGAL RESTRICTIONS

The industry will be barred from launching any new legal challenges against the enforcement or constitutionality of tobacco control laws, ordinances and rules passed prior to June 1, 1998.

The industry will be prohibited from opposing proposed state or local laws or administrative rules intended to limit youth access to and consumption of tobacco products.

The industry will be prohibited from lobbying for the diversion of settlement funds to non-tobacco or non-health related uses, or for legislation intended to eliminate or diminish state rights under the settlement.

RELEASE OF LIABILITY

States signing on to the agreement drop their current claims against the industry, and the industry would drop any current challenges to state litigation. The agreement specifies that states reserve the right to pursue criminal prosecutions based on federal, state or local laws.

The agreement contains no limitations on private suits against the tobacco industry.

FULL DISCLOSURE

The tobacco industry will release internal documents under protective orders in state lawsuits, except for documents subject to privilege and trade secret claims. The industry will be required to maintain for 10 years a Website of all documents produced in state or other health-related lawsuits. This provision also requires creation of a user-friendly index for the site.

CONSPIRACY & MISREPRESENTATIONS

The agreement bars the industry from jointly contracting or conspiring to limit information about the health hazards of their products; limit or suppress research into smoking and health; limit or suppress research into the marketing or development of new products.

The agreement prohibits the tobacco industry from making any material misrepresentations regarding the health consequences of smoking.

DISBANDS TRADE ASSOCIATIONS

The agreement disbands the Council for Tobacco Research, the Tobacco Institute and the Council for Indoor Air Research. It also provides for the regulation and oversight of any new industry trade associations.

ENFORCEMENT

The terms of the agreement will be enforced through a court-ordered consent decree in each state. On March 31, 1999, the industry will be required to pay $50 million into a fund that states will use to enforce and implement the agreement, as well as to investigate and litigate potential violations.

COST RECOVERY & ATTORNEY FEES

Tobacco companies will reimburse the offices of state attorneys general for all reasonable costs, expenses and staff attorney fees up to a total of $150 million nationwide.

The industry will pay outside attorney fees separate from any other financial payments.

Private attorneys can negotiate a "liquidated fee arrangement" that will be paid during a four-year period from a pool of $1.25 billion in industry funds. Private attorneys who accept a liquidated fee must release the state from all claims for attorney fees. If private attorneys reject the liquidated fee or cannot agree to an offer, they can go through arbitration. The industry will pay the arbiter's award, with the timing of the payments determined by funds available under a $500 million per year cap.

MOST FAVORED NATION PROVISION

Any agreement with a non-settling state that has more favorable overall terms will cause the more favorable terms to be passed along to settling states. This provisions does not apply to more favorable economic terms in an agreement reached after a jury is seated or a trial begins.

(end)

[Signed Nov. 23, 1998]

MASTER SETTLEMENT AGREEMENT

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(ii) "Outdoor Advertising" means (1) billboards, (2) signs and placards in arenas, stadiums, shopping malls and Video Game Arcades (whether any of the foregoing are open air or enclosed) (but not including any such sign or placard located in an Adult-Only Facility), and (3) any other advertisements placed (A) outdoors, or (B) on the inside surface of a window facing outward. Provided, however, that the term "Outdoor Advertising" does not mean (1) an advertisement on the outside of a Tobacco Product manufacturing facility; (2) an individual advertisement that does not occupy an area larger than 14 square feet (and that neither is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet, nor functions solely as a segment of a larger advertising unit or series), and that is placed (A) on the outside of any retail establishment that sells Tobacco Products (other than solely through a vending machine), (B) outside (but on the property of) any such establishment, or (C) on the inside surface of a window facing outward in any such establishment; (3) an advertisement inside a retail establishment that sells Tobacco Products (other than solely through a vending machine) that is not placed on the inside surface of a window facing outward; or (4) an outdoor advertisement at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

* * * *

(xx) "Transit Advertisements" means advertising on or within private or public vehicles and all advertisements placed at, on or within any bus stop, taxi stand, transportation waiting area, train station, airport or any similar location. Notwithstanding the

foregoing, the term "Transit Advertisement" does not include (1) any advertisement placed in, on or outside the premises of any retail establishment that sells Tobacco Products (other than solely through a vending machine) (except if such individual advertisement (A) occupies an area larger than 14 square feet; (B) is placed in such proximity to any other such advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet; or (C) functions solely as a segment of a larger advertising unit or series); or (2) advertising at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

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III. PERMANENT RELIEF

(a) Prohibition on Youth Targeting. No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

(b) Ban on Use of Cartoons. Beginning 180 days after the MSA Execution Date, no Participating Manufacturer may use or cause to be used any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products.

(c) Limitation of tobacco Brand Name Sponsorships.

(1) Prohibited Sponsorships. After the MSA Execution Date, no Participating Manufacturer may engage in any Brand Name Sponsorship in any State consisting of:

(A) concerts; or

(B) events in which the intended audience is comprised of a significant percentage of Youth; or

(C) events in which any paid participants or contestants are Youth; or

(D) any athletic event between opposing teams in any football, basketball, baseball, soccer or hockey league.

(2) Limited Sponsorships.

(A) No Participating Manufacturer may engage in more than one Brand Name Sponsorship in the States in any twelve-month period (such period measured from the date of the initial sponsored event).

(B) Provided, however, that

(i) nothing contained in subsection (2)(A) above shall require a Participating Manufacturer to breach or terminate any sponsorship contract in existence as of August 1, 1998 (until the earlier of (x) the current term of any existing contract, without regard to any renewal or option that may be exercised by such Participating Manufacturer or (y) three years after the MSA Execution Date); and

(ii) notwithstanding subsection (1)(A) above, Brown & Williamson Tobacco Corporation may sponsor either the CPC country music festival or the Kool jazz festival as its one annual Brand Name Sponsorship permitted pursuant to subsection (2)(A) as well as one Brand Name Sponsorship permitted pursuant to subsection (2)(B)(i).

(3) Related Sponsorship Restrictions. With respect to any Brand Name Sponsorship permitted under this subsection (c):

(A) advertising of the Brand Name Sponsorship event shall not advertise any Tobacco Product (other

than by using the Brand Name to identify such Brand Name Sponsorship event);

(B) no Participating Manufacturer may refer to a Brand Name sponsorship event or to a celebrity or other person in such an event in its advertising of a Tobacco Product;

(C) nothing contained in the provisions of subsection III(e) of this Agreement shall apply to actions taken by any Participating Manufacturer in connection with a Brand Name Sponsorship permitted pursuant to the provisions of subsections (2)(A) and (2)(B)(i); the Brand Name Sponsorship permitted by subsection (2)(B)(ii) shall be subject to the restrictions of subsection III(e) except that such restrictions shall not prohibit use of the Brand Name to identify the Brand Name Sponsorship;

(D) nothing contained in the provisions of subsections III(f) and III(i) shall apply to apparel or other merchandise: (i) marketed, distributed, offered, sold, or licensed at the site of a Brand Name Sponsorship permitted pursuant to subsections (2)(A) or (2)(B)(i) by the person to which the relevant Participating Manufacturer has provided payment in exchange for the use of the relevant Brand Name in the Brand Name Sponsorship or a third-party that does not receive payment from the relevant Participating Manufacturer (or any Affiliate of such Participating Manufacturer) in connection with the marketing, distribution, offer, sale or license of such apparel or other merchandise; or (ii) used at the site of a Brand Name Sponsorship permitted pursuant to subsection (2)(A) or (2)(B)(i) (during such event) that are not distributed (by sale or otherwise) to any member of the general public; and

(E) nothing contained in the provisions of subsection III(d) shall: (i) apply to the use of a Brand Name on a vehicle used in a Brand Name Sponsorship; or (ii) apply to Outdoor Advertising advertising the Brand Name Sponsorship, to the extent that such Outdoor Advertising is placed at the site of a Brand Name Sponsorship no more than 90 days before the start of the initial sponsored event, is removed within 10 days after the end of the last sponsored event, and is not prohibited by subsection (3)(A) above.

(4) Corporate Name Sponsorships. Nothing in this subsection (c) shall prevent a Participating Manufacturer from sponsoring or causing to be sponsored any athletic, musical, artistic, or other social or cultural event, or any entrant, participant or team in such event (or series of events) in the name of the corporation which manufactures Tobacco Products, provided that the corporate name does not include any Brand Name of domestic Tobacco Products.

(5) Naming Rights Prohibition. No Participating Manufacturer may enter into any agreement for the naming rights of any stadium or arena located within a Settling State using a Brand Name, and shall not otherwise cause a stadium or arena located within a Settling State to be named with a Brand Name.

(6) Prohibition on Sponsoring Teams and Leagues. No Participating Manufacturer may enter into any agreement pursuant to which payment is made (or other consideration is provided) by such Participating Manufacturer to any football, basketball, baseball, soccer or hockey league (or any team involved in any such league) in exchange for use of a Brand Name.

(d) Elimination of Outdoor Advertising and Transit Advertisements. Each Participating Manufacturer shall discontinue Outdoor Advertising and Transit Advertisements

advertising Tobacco Products within the Settling States as set forth herein.

(1) Removal. Except as otherwise provided in this section, each Participating Manufacturer shall remove from within the Settling States within 150 days after the MSA Execution Date all of its (A) billboards (to the extent that such billboards constitute Outdoor Advertising) advertising Tobacco Products; (B) signs and placards (to the extent that such signs and placards constitute Outdoor Advertising) advertising Tobacco Products in arenas, stadiums, shopping malls and Video Game Arcades; and (C) Transit Advertisements advertising Tobacco Products.

(2) Prohibition on New Outdoor Advertising and Transit Advertisements. No Participating Manufacturer may, after the MSA Execution Date, place or cause to be placed any new Outdoor Advertising advertising Tobacco Products or new Transit Advertisements advertising Tobacco Products within any Settling State.

(3) Alternative Advertising. With respect to those billboards required to be removed under subsection (1) that are leased (as opposed to owned) by any Participating Manufacturer, the Participating Manufacturer will allow the Attorney General of the Settling State within which such billboards are located to substitute, at the Settling State's option, alternative advertising intended to discourage the use of Tobacco Products by Youth and their exposure to second-hand smoke for the remaining term of the applicable contract (without regard to any renewal or option term that may be exercised by such Participating Manufacturer). The Participating Manufacturer will bear the cost of the lease through the end of such remaining term. Any other costs associated with such alternative advertising will be borne by the Settling State.

(4) Ban on Agreements Inhibiting Anti-Tobacco Advertising. Each Participating Manufacturer agrees that it will not enter into any agreement that prohibits a third party from selling, purchasing or displaying advertising discouraging the use of Tobacco Products or exposure to second-hand smoke. In the event and to the extent that any Participating Manufacturer has entered into an agreement containing any such prohibition, such Participating Manufacturer agrees to waive such prohibition in such agreement.

(5) Designation of Contact Person. Each Participating Manufacturer that has Outdoor Advertising or Transit Advertisements advertising Tobacco Products within a Settling State shall, within 10 days after the MSA Execution Date, provide the Attorney General of such Settling State with the name of a contact person to whom the Settling State may direct inquiries during the time such Outdoor Advertising and Transit Advertisements are being eliminated, and from whom the Settling State may obtain periodic reports as to the progress of their elimination.

(6) Adult-Only Facilities. To the extent that any advertisement advertising Tobacco Products located within an Adult-Only Facility constitutes Outdoor Advertising or a Transit Advertisement, this subsection (d) shall not apply to such advertisement, provided such advertisement is not visible to persons outside such Adult-Only Facility.

(e) Prohibition on Payments Related to Tobacco Products and Media. No Participating Manufacturer may, beginning 30 days after the MSA Execution Date, make, or cause to be made, any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial

film or video, or video game ("Media"); provided, however, that the foregoing prohibition shall not apply to (1) Media where the audience or viewers are within an Adult-Only Facility (provided such Media are not visible to persons outside such Adult-Only Facility); (2) Media not intended for distribution or display to the public; or (3) instructional Media concerning non-conventional cigarettes viewed only by or provided only to smokers who are Adults.

(f) Ban on Tobacco Brand Name Merchandise. Beginning July 1, 1999, no Participating Manufacturer may, within any Settling State, market, distribute, offer, sell, license or cause to be marketed, distributed, offered, sold or licensed (including, without limitation, by catalogue or direct mail), any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name. Provided, however, that nothing in this subsection shall (1) require any Participating Manufacturer to breach or terminate any licensing agreement or other contract in existence as of June 20, 1997 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); (2) prohibit the distribution to any Participating Manufacturer's employee who is not Underage of any item described above that is intended for the personal use of such an employee; (3) require any Participating Manufacturer to retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed, or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer; (4) apply to coupons or other items used by Adults solely in connection with the purchase of Tobacco Products; or (5) apply to apparel or other merchandise used within an Adult-Only Facility that is not distributed (by sale or otherwise) to any member of the general public.

(g) Ban on Youth Access to Free Samples. After the MSA Execution Date, no Participating Manufacturer may, within any Settling State, distribute or cause to be distributed any free samples of Tobacco Products except in an Adult-Only Facility. For purposes of this Agreement, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with (1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products (including, but not limited to, a free offer in connection with the purchase of Tobacco Products, such as a "two-for-one" offer), or (2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

(h) Ban on Gifts to Underage Persons Based on Proofs of Purchase. Beginning one year after the MSA Execution Date, no Participating Manufacturer may provide or cause to be provided to any person without sufficient proof that such person is an Adult any item in exchange for the purchase of Tobacco Products, or the furnishing of credits, proofs-of-purchase, or coupons with respect to such a purchase. For purposes of the preceding sentence only, (1) a driver's license or other government-issued identification (or legible photocopy thereof), the validity of which is certified by the person to whom the item is provided, shall by itself be deemed to be a sufficient form of proof of age; and (2) in the case of items provided (or to be redeemed) at retail establishments, a Participating Manufacturer shall be entitled to rely on verification of proof of age by the retailer, where such retailer is required to obtain verification under applicable federal, state or local law.

(i) Limitation on third-Party Use of Brand Names. After the MSA Execution Date, no Participating Manufacturer may license or otherwise expressly authorize any third party to use or advertise within any Settling State any Brand Name in a manner prohibited by this Agreement if done by such Participating Manufacturer itself. Each Participating Manufacturer shall, within 10 days after the MSA Execution Date, designate a person

(and provide written notice to NAAG of such designation) to whom the Attorney General of any Settling State may provide written notice of any such third-party activity that would be prohibited by this Agreement if done by such Participating Manufacturer itself. Following such written notice, the Participating Manufacturer will promptly take commercially reasonable steps against any such non-de minimis third-party activity. Provided, however, that nothing in this subsection shall require any Participating Manufacturer to (1) breach or terminate any licensing agreement or other contract in existence as of July 1, 1998 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); or (2) retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer.

(j) Ban on Non-tobacco Brand Names. No Participating Manufacturer may, pursuant to any agreement requiring the payment of money or other valuable consideration, use or cause to be used as a brand name of any Tobacco Product any nationally recognized or nationally established brand name or trade name of any non-tobacco item or service or any nationally recognized or nationally established sports team, entertainment group or individual celebrity. Provided, however, that the preceding sentence shall not apply to any Tobacco Product brand name in existence as of July 1, 1998. For the purposes of this subsection, the term "other valuable consideration" shall not include an agreement between two entities who enter into such agreement for the sole purpose of avoiding infringement claims.

(k) Minimum Pack Size of Twenty Cigarettes. No Participating Manufacturer may, beginning 60 days after the MSA Execution Date and through and including December 31, 2001, manufacture or cause to be manufactured for sale in any Settling State any pack or other container of Cigarettes

containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco). No Participating Manufacturer may, beginning 150 days after the MSA Execution Date and through and including December 31, 2001, sell or distribute in any Settling State any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco). Each Participating Manufacturer further agrees that following the MSA Execution Date it shall not oppose, or cause to be opposed (including through any third party or Affiliate), the passage by any Settling State of any legislative proposal or administrative rule applicable to all Tobacco Product Manufacturers and all retailers of Tobacco Products prohibiting the manufacture and sale of any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco).

(l) Corporate Culture Commitments Related to Youth Access and Consumption. Beginning 180 days after the MSA Execution Date each Participating Manufacturer shall:

(1) promulgate or reaffirm corporate principles that express and explain its commitment to comply with the provisions of this Agreement and the reduction of use of Tobacco Products by Youth, and clearly and regularly communicate to its employees and customers its commitment to assist in the reduction of Youth use of Tobacco Products;

(2) designate an executive level manager (and provide written notice to NAAG of such designation) to identify methods to reduce Youth access to, and the incidence of Youth consumption of, tobacco Products; and

(3) encourage its employees to identify additional methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products.

(m) Limitations on Lobbying. Following State-Specific Finality in a Settling State:

(1) No Participating Manufacturer may oppose, or cause to be opposed (including through any third party or Affiliate), the passage by such Settling State (or any political subdivision thereof) of those state or local legislative proposals or administrative rules described in Exhibit F hereto intended by their terms to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products. Provided, however, that the foregoing does not prohibit any Participating Manufacturer from (A) challenging enforcement of, or suing for declaratory or injunctive relief with respect to, any such legislation or rule on any grounds; (B) continuing, after State-Specific Finality in such Settling State, to oppose or cause to be opposed, the passage during the legislative session in which State-Specific Finality in such Settling State occurs of any specific state or local legislative proposals or administrative rules introduced prior to the time of State-Specific Finality in such Settling State; (C) opposing, or causing to be opposed, any excise tax or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers; or (D) opposing, or causing to be opposed, any state or local legislative proposal or administrative rule that also includes measures other than those described in Exhibit F.

(2) Each Participating Manufacturer shall require all of its officers and employees engaged in lobbying activities in such Settling State after State-Specific Finality, contract lobbyists engaged in lobbying activities in such Settling State after State-Specific Finality, and any other third parties who engage in lobbying activities in such Settling State after State-Specific Finality on behalf of such Participating

Manufacturer ("lobbyist" and "lobbying activities" having the meaning such terms have under the law of the Settling State in question) to certify in writing to the Participating Manufacturer that they:

> (A) will not support or oppose any state, local or federal legislation, or seek or oppose any governmental action, on behalf of the Participating Manufacturer without the Participating Manufacturer's express authorization (except where such advance express authorization is not reasonably practicable);

* * * *

[Dated December 3, 1998]

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.	Superior Court Department of the Trial Court
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES, P.L.C., LORILLARD TOBACCO COMPANY, LIGGETT GROUP, INC., NEW ENGLAND WHOLESALE TOBACCO CO., INC., ALBERT H. NOTINI & SONS, INC., THE COUNCIL FOR TOBACCO RESEARCH-U.S.A., INC., and THE TOBACCO INSTITUTE, INC., Defendants.	) Civil Action) No.: 95-7378-J

CONSENT DECREE AND FINAL JUDGMENT

WHEREAS, Plaintiff, the Commonwealth of Massachusetts, commenced this action on December 19, 1995, by and through its Attorney General, Scott Harshbarger, pursuant to his common law

powers and the provisions of the laws of the Commonwealth of Massachusetts;

WHEREAS, the Commonwealth of Massachusetts asserted various claims for monetary, equitable and injunctive relief on behalf of the Commonwealth of Massachusetts against certain tobacco product manufacturers and other defendants;

WHEREAS, Defendants have contested the claims in the Commonwealth's complaint and amended complaint and denied the Commonwealth's allegations and asserted affirmative defenses;

WHEREAS, the parties desire to resolve this action in a manner which appropriately addresses the Commonwealth's public health concerns, while conserving the parties resources, as well as those of the Court, which would otherwise be expended in litigating a matter of this magnitude; and

WHEREAS, the Court has made no determination of any violation of law, this Consent Decree and Final Judgment being entered prior to the taking of any testimony, and without trial or final adjudication of any issue of fact or law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action and over each of the Participating Manufacturers. Venue is proper in this county.

II. DEFINITIONS

The definitions set forth in the Agreement (a copy of which is attached hereto) are incorporated herein by reference.

III. APPLICABILITY

A. This Consent Decree and Final Judgment applies only to the Participating Manufacturers in their corporate capacity acting through their respective successors and assigns, directors, officers,

employees, agents, subsidiaries, divisions, or other internal organizational units of any kind or any other entities acting in concert or participation with them. The remedies, penalties and sanctions that may be imposed or assessed in connection with a violation of this Consent Decree and Final Judgment (or any order issued in connection herewith) shall only apply to the Participating Manufacturers, and shall not be imposed or assessed against any employee, officer or director of any Participating Manufacturer, or against any other person or entity as a consequence of such violation, and there shall be no jurisdiction under this Consent Decree and Final Judgment to do so.

B. This Consent Decree and Final Judgment is not intended to and does not vest standing in any third party with respect to the terms thereof. No portion of this Consent Decree and Final Judgment shall provide any rights to, or be enforceable by, any person or entity other than the Commonwealth of Massachusetts or a Released Party. The Commonwealth of Massachusetts may not assign or otherwise convey any right to enforce any provision of this Consent Decree and Final Judgment.

IV. VOLUNTARY ACT OF THE PARTIES

The parties hereto expressly acknowledge and agree that this Consent Decree and Final Judgment is voluntarily entered into as the result of arm's-length negotiation, and all parties hereto were represented by counsel in deciding to enter into this Consent Decree and Final Judgment.

V. INJUNCTIVE AND OTHER EQUITABLE RELIEF

Each Participating Manufacturer is permanently enjoined from:

A. Taking any action, directly or indirectly, to target Youth within the Commonwealth of Massachusetts in the advertising, promotion or marketing of Tobacco Products, or taking any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within the Commonwealth of Massachusetts.

B. After 180 days after the MSA Execution Date, using or causing to be used within the Commonwealth of Massachusetts any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products.

C. After 30 days after the MSA Execution Date, making or causing to be made any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop within the Commonwealth of Massachusetts any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any Media; provided, however, that the foregoing prohibition shall not apply to (1) Media where the audience or viewers are within an Adult-Only Facility (provided such Media are not visible to persons outside such Adult-Only Facility); (2) Media not intended for distribution or display to the public; (3) instructional Media concerning non-conventional cigarettes viewed only by or provided only to smokers who are Adults; and (4) actions taken by any Participating Manufacturer in connection with a Brand Name Sponsorship permitted pursuant to subsections III(c)(2)(A) and III(c)(2)(B)(i) of the Agreement, and use of a Brand Name to identify a Brand Name Sponsorship permitted by subsection III(c)(2)(B)(ii).

D. Beginning July 1, 1999, marketing, distributing, offering, selling, licensing or causing to be marketed, distributed, offered, sold, or licensed (including, without limitation, by catalogue or direct mail), within the Commonwealth of Massachusetts, any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name. Provided, however, that nothing in this section shall (1) require any Participating Manufacturer to breach or terminate any licensing agreement or other contract in existence as of June 20, 1997 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer; (2) prohibit the distribution to any Participating Manufacturer's employee who is not

Underage of any item described above that is intended for the personal use of such an employee; (3) require any Participating Manufacturer to retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer, (4) apply to coupons or other items used by Adults solely in connection with the purchase of Tobacco Products; (5) apply to apparel or other merchandise used within an Adult-Only Facility that is not distributed (by sale or otherwise) to any member of the general public; or (6) apply to apparel or other merchandise (a) marketed, distributed, offered, sold, or licensed at the site of a Brand Name Sponsorship permitted pursuant to subsection III(c)(2)(A) or III(c)(2)(B)(i) of the Agreement by the person to which the relevant Participating Manufacturer has provided payment in exchange for the use of the relevant Brand Name in the Brand Name Sponsorship or a third-party that does not receive payment from the relevant Participating Manufacturer (or any Affiliate of such Participating Manufacturer) in connection with the marketing, distribution, offer, sale or license of such apparel or other merchandise, or (b) used at the site of a Brand Name Sponsorship permitted pursuant to subsections III(c)(2)(A) or III(c)(2)(B)(i) of the Agreement (during such event) that are not distributed (by sale or otherwise) to any member of the general public.

E. After the MSA Execution Date, distributing or causing to be distributed within the Commonwealth of Massachusetts any free samples of Tobacco Products except in an Adult-Only Facility. For purposes of this Consent Decree and Final Judgment, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with (1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products (including, but not limited to, a free offer in connection with the purchase of Tobacco Products, such as a "two-for-one" offer), or (2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

F. Using or causing to be used as a brand name of any Tobacco Product pursuant to any agreement requiring the payment of money or other valuable consideration, any nationally recognized or nationally established brand name or trade name of any non-tobacco item or service or any nationally recognized or nationally established sports team, entertainment group or individual celebrity. Provided, however, that the preceding sentence shall not apply to any Tobacco Product brand name in existence as of July 1, 1998. For the purposes of this provision, the term "other valuable consideration" shall not include an agreement between two entities who enter into such agreement for the sole purpose of avoiding infringement claims.

G. After 60 days after the MSA Execution Date and through and including December 31, 2001, manufacturing or causing to be manufactured for sale within the Commonwealth of Massachusetts any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco); and, after 150 days after the MSA Execution Date and through and including December 31, 2001, selling or distributing within the Commonwealth of Massachusetts any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-you-own tobacco containing less than 0.60 ounces of tobacco).

H. Entering into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products. Provided, however, that nothing in the preceding sentence shall be deemed to (1) require any Participating Manufacturer to produce, distribute or otherwise disclose any information that is subject to any privilege or protection; (2) preclude any Participating Manufacturer from entering into any joint defense or joint legal interest agreement or arrangement

(whether or not in writing), or from asserting any privilege pursuant thereto; or (3) impose any affirmative obligation on any Participating Manufacturer to conduct any research.

I. Making any material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients. Provided, however, that nothing in the preceding sentence shall limit the exercise of any First Amendment right or the assertion of any defense or position in any judicial, legislative or regulatory forum.

VI. MISCELLANEOUS PROVISIONS

A. Jurisdiction of this case is retained by the Court for the purposes of implementing and enforcing the Agreement and this Consent Decree and Final Judgment and enabling the continuing proceedings contemplated herein. Whenever possible, the Commonwealth of Massachusetts and the Participating Manufacturers shall seek to resolve any issue that may exist as to compliance with this Consent Decree and Final Judgment by discussion among the appropriate designees named pursuant to subsequent XVIII(m) of the Agreement. The Commonwealth of Massachusetts and/or any Participating Manufacturer may apply to the Court at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement of this Consent Decree and Final Judgment. Provided, however, that with regard to subsections V(A) and V(I) of this Consent Decree and Final Judgment, the Attorney General shall issue a cease and desist demand to the Participating Manufacturer that the Attorney General believes is in violation of either of such sections at least ten Business Days before the Attorney General applies to the Court for an order to enforce such subsections, unless the Attorney General reasonably determines that either a compelling time-sensitive public health and safety concern requires more immediate action or the Court has previously issued an Enforcement Order to the Participating Manufacturer in question for the same or a substantially similar action or activity. For any claimed violation of this Consent Decree and Final Judgment, in determining whether to seek an order for

monetary, civil contempt or criminal sanctions for any claimed violation, the Attorney General shall give good-faith consideration to whether: (1) the Participating Manufacturer that is claimed to have committed the violation has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless that party has been guilty of a pattern of violations of like nature; and (2) a legitimate, good-faith dispute exists as to the meaning of the terms in question of this Consent Decree and Final Judgment. The Court in any case in its discretion may determine not to enter an order for monetary, civil contempt or criminal sanctions.

B. This Consent Decree and Final Judgment is not intended to be, and shall not in any event be construed as, or deemed to be, an admission or concession or evidence of (1) any liability or any wrongdoing whatsoever on the part of any Released Party or that any Released Party has engaged in any of the activities barred by this Consent Decree and Final Judgment; or (2) personal jurisdiction over any person or entity other than the Participating Manufacturers. Each Participating Manufacturer specifically disclaims and denies any liability or wrongdoing whatsoever with respect to the claims and allegations asserted against it in this action, and has stipulated to the entry of this Consent Decree and Final Judgment solely to avoid the further expense, inconvenience, burden and risk of litigation.

C. Except as expressly provided otherwise in the Agreement, this Consent Decree and Final Judgment shall not be modified (by this Court, by any other court or by any other means) unless the party seeking modification demonstrates, by clear and convincing evidence, that it will suffer irreparable harm from new and unforeseen conditions. Provided, however, that the provision of sections III, V, VI and VII of this Consent Decree and Final Judgment shall in no event be subject to modification without the consent of the Commonwealth of Massachusetts and all affected Participating Manufacturers. In the event that any of the sections of this Consent Decree and Final Judgment enumerated in the preceding sentence are modified by this Court, by any other court or by any other means without the consent of the Commonwealth of Massachusetts and all

affected Participating Manufacturers, then this Consent Decree and Final Judgment shall be void and of no further effect. Changes in the economic conditions of the parties shall not be grounds for modificat[illegible] it is intended that the Participating Manufacturers will comply with this Consent Decree and Final Judgment as originally entered, even if the Participating Manufacturers' obligations hereunder are greater than those imposed under current or future law (unless compliance with this Consent Decree and Final Judgment would violate such law). A change in law that results, directly or indirectly, in more favorable or beneficial treatment of any one or more of the Participating Manufacturers shall not support modification of this Consent Decree and Final Judgment.

D. In any proceeding which results in a finding that a Participating Manufacturer violated this Consent Decree and Final Judgment, the Participating Manufacturer or Participating Manufacturers found to be in violation shall pay the Commonwealth's costs and attorneys' fees incurred by the Commonwealth of Massachusetts in such proceeding.

E. The remedies in this Consent Decree and Final Judgment are cumulative and in addition to any remedies the Commonwealth of Massachusetts may have at law or equity, including but not limited to its rights under the Agreement. Nothing herein shall be construed to prevent the Commonwealth from bringing an action with respect to conduct not released pursuant to the Agreement, even though that conduct may also violate this Consent Decree and Final Judgment. Nothing in this Consent Decree and Final Judgment is intended to create any right for Commonwealth of Massachusetts to obtain any Cigarette product formula that it would not otherwise have under applicable law.

F. No party shall be considered the drafter of this Consent Decree and Final Judgment for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter. Nothing in this Consent Decree and Final Judgment shall be construed as approval by the Commonwealth of Massachusetts of the Participating

Manufacturers' business organizations, operations, acts or practices, and the Participating Manufacturers shall make no representation to the contrary.

G. The settlement negotiations resulting in this Consent Decree and Final Judgment have been undertaken in good faith and for settlement purposes only, and no evidence of negotiations or discussions underlying this Consent Decree and Final Judgment shall be offered or received in evidence in any action or proceeding for any purpose. Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments with respect to this Consent Decree and Final Judgment by the Commonwealth of Massachusetts or any Participating Manufacturing or its agents shall be offered or received in evidence in any action or proceeding for any purpose other than in action or proceeding arising under or relating to this Consent Decree and Final Judgment.

H. All obligations of the Participating Manufacturers pursuant to this Consent Decree and Final Judgment (including, but not limited to, all payments obligations) are, and shall remain, several and not joint.

I. The provisions of this Consent Decree and Final Judgment are applicable only to actions taken (or omitted to be taken) within the States. Provided, however, that the preceding sentence shall not be construed as extending the territorial scope of any provision of this Consent Decree and Final Judgment whose scope is otherwise limited by the terms thereof.

J. Nothing in subsection V(A) or V(I) of this Consent Decree shall create a right to challenge the continuation, after the MSA Execution Date, of any advertising content, claim or slogan (other than use of a Cartoon) that was not unlawful prior to the MSA Execution Date.

K. If the Agreement terminates in this Commonwealth for any reason, then this Consent Decree and Final Judgment shall be void and of no further effect.

VII. FINAL DISPOSITION

A. The Agreement, the settlement set forth therein, and the establishment of the escrow provided for therein are hereby approved in all respects, and all claims are hereby dismissed with prejudice as provided therein.

B. The Court finds that the person[s] signing the Agreement have full and complete authority to enter into the binding and fully effective settlement of this action as set forth in the Agreement. The Court further finds that entering into this settlement is in the best interests of the Commonwealth of Massachusetts.

LET JUDGMENT BE ENTERED ACCORDINGLY

DATED this 3d day of December, 1998.

[illegible]

Massachusetts

Department of Education

Tobacco Use Among High School Students: 1999 Massachusetts Youth Risk Behavior Survey Results

November 1999

The Commonwealth of Massachusetts
Department of Education

350 Main Street Malden, Massachusetts 02148-5023
Telephone (781) 338-3000
TTY: N.E.T. Relay 1-800-439-2370

David P. Driscoll
Commission of Education

November 1999

Dear Parents, Students, and Colleagues:

I have attached a report of results concerning adolescent tobacco use from the Department of Education's 1999 Massachusetts Youth Risk Behavior Survey. This anonymous and voluntary survey was conducted last spring in 64 randomly selected public high schools across the Commonwealth; over 4000 students participated. Because both school and student response rates were high, these results can be considered representative of public high school students in the state. The full Youth Risk Behavior Survey Report, which will discuss a range of adolescent risk behaviors in addition to tobacco use, will be available in spring 2000.

Every measure of tobacco use among Massachusetts adolescents has decreased since 1995. The drop in smokeless tobacco use is statistically significant. Declines in ever having tried cigarettes, recent cigarette smoking, smoking before age 13, and smoking on school property have also occurred. Massachusetts can be very encouraged by these positive trends in youth tobacco use.

Difficult as it is to change widespread patterns of tobacco use among adolescents, results reported here indicated that such changes are taking place. The findings contained in this report highlight the importance of early tobacco prevention education that teaches young people both factual knowledge about tobacco and also the skills they need to resist peer and media pressures to smoke. Strong tobacco prevention education, integrated into comprehensive school health programs and reinforced by parents and communities, can reduce and ultimately eliminate tobacco use as a threat to the health of our youth.

Thank you for your own commitment to improving the lives and health of all Massachusetts students.

Sincerely,

/s/ David P. Driscoll
David P. Driscoll
Commissioner of Education

Tobacco Use Among High School Students: 1999 Massachusetts Youth Risk Behavior Survey Results

* * * *

Every two years, the Massachusetts Department of Education conducts the Massachusetts Youth Risk Behavior Survey (MYRBS) to examine the recent rates of adolescent health risk behaviors, including rates of tobacco use. The 1999 MYRBS, administered in randomly chosen public high schools in the Commonwealth in Spring 1999, included questions that asked students to report their history and recent use of cigarettes and smokeless tobacco both on and off school property. For the first time, the MYRBS included a question about recent cigar smoking as well. The MYRBS also asked about students' attempts to quit smoking and about their customary method of obtaining cigarettes. Results reported here can be generalized to provide an accurate estimate of tobacco use among Massachusetts high school students as a whole.

* * * *

Key Findings From the 1999 MYRBS

- Lifetime cigarette use, smoking before age 13, recent smoking, daily smoking, and smoking on school property have declined since 1995. These positive findings, while not statistically significant, demonstrate consistent declines in risk behaviors. Recent smokeless tobacco use both on and off school property has declined steadily and significantly since 1993.
- Over two-thirds of Massachusetts high school students (67%) have tried smoking cigarettes, at least one or two puffs (lifetime use). One quarter of all students (23%) smoked a whole cigarette for the first time before they were 13.
- During the 30 days prior to the survey
- Three in ten students (30%) smoked cigarettes at least once (recent use).

- One in eight students (13%) smoked cigarettes every day (daily use).
- One in six students (16%) smoked cigarettes on school property.
- One in six students (16%) smoked a cigar or cigarillo.
- Five percent of students used smokeless tobacco (chewing tobacco or snuff) at least once, and 3% did so on school property.
- Over one third of students (35%) used *some* form of tobacco.

♦ Male and female adolescents had similar rates of cigarette smoking, but males were much more likely than females to report smoking cigars or using smokeless tobacco.

♦ In general, tobacco use of all kinds was higher among White students and students of other/ mixed ethnicity than it was among Black, Hispanic, or Asian students.

♦ Most recent smokers (58%) and daily smokers (74%) report having tried to quit smoking at least once. Of all students who described themselves as ever having been regular smokers, only one in six (17%) had successfully quit smoking.

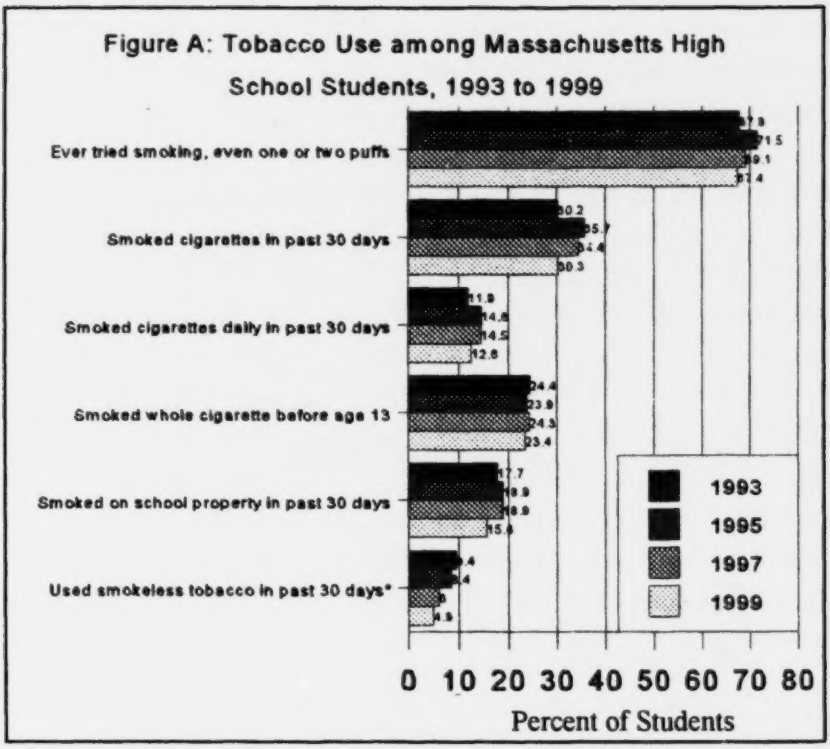
♦ Of adolescents who smoked any cigarettes in the month prior to the survey, 36% usually obtained their cigarettes by buying them in a store. This represents a significant decline from 1995, when nearly half (48%) bought their cigarettes in a store.

♦ The percent of adolescents who were asked for proof of age when they tried to buy cigarettes in a store decreased from 1997 to 1999 (61% to 55%)

* * * *

Results: Lifetime Cigarette Smoking

♦ Over two thirds of Massachusetts high school students (67%) have tried smoking (at least one or two puffs) at some time (lifetime use).



*Statistically significant decline from 1993 and 1995 to 1999, p. < .05.

- Lifetime cigarette smoking, which had risen significantly in the early 90's, has decreased slightly but steadily since then, from 72% (1995) to 67% (1999). (See Figure A, above.)

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Results: Daily Cigarette Smoking

- Rates of daily smoking dropped slightly between 1997 and 1999 (15% to 13%).
- Daily smoking increased with grade level, from 8% among 9th grade students to 17% among high school seniors.

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- Among students who smoked every day, 42% smoked at least half a pack a day (11 or more cigarettes), a proportion that has not changed since 1997.

Results: Cigarette Smoking before Age 13

- Almost one quarter of Massachusetts students (23%) reported smoking their first whole cigarette before age 13. Pre-teen smoking has remained virtually unchanged since 1993.
- Male students were somewhat more likely than female students to have smoked their first cigarette before age 13 (25% vs. 22%).

* * * *

- Of all students who had ever smoked a whole cigarette, those who first did so before age 13 were significantly more likely than their peers who started later to be recent cigarette smokers (67% vs. 51%), daily smokers (36% vs. 16%), recent cigar smokers (34% vs. 19%) and smokeless tobacco users (12% vs. 6%).

* * * *

Results: Cigar Smoking and Smokeless Tobacco Use

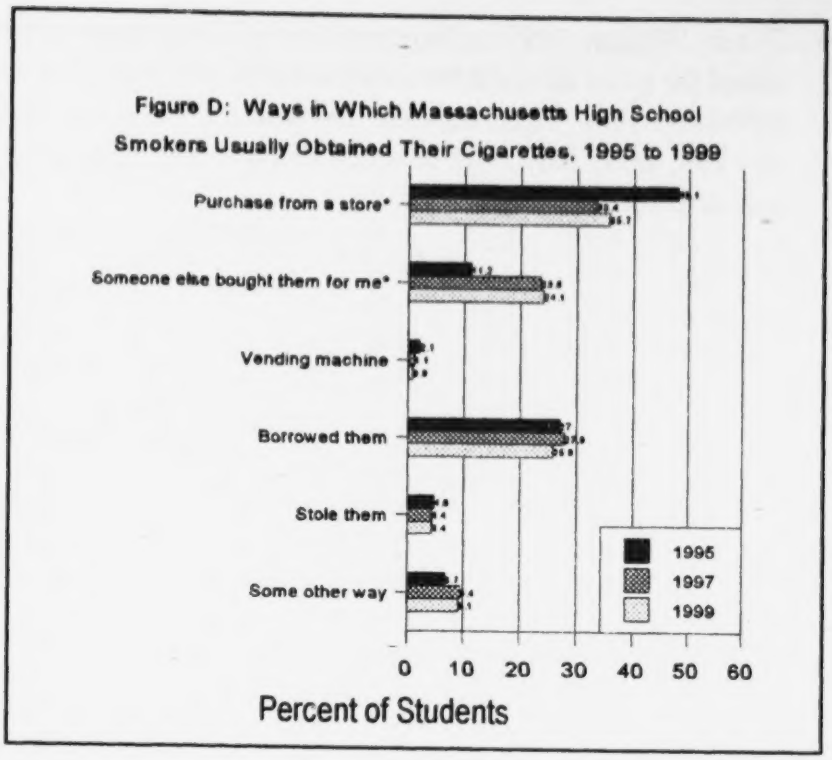
- One in six adolescents (15.6%) reported smoking cigars or cigarillos in the month prior to the survey. The Massachusetts YRBS did not include questions concerning cigar smoking among high school students before 1999.
- Males were significantly more likely than females to have smoked cigars or cigarillos recently (23% vs. 8%).
- Past month cigar smoking was most commonly reported by adolescents of other/mixed ethnicity (26%), followed by White (16%), Black (15%), Asian (11%), and Hispanic (10%) youth.
- Smokeless tobacco (chewing tobacco or snuff) was used by 4.9% of students in the month before the survey. Half of this group (2.7%) also reported using smokeless tobacco on school property.

* * * *

Results: Smoking Cessation

- Nearly one quarter of all students (24%) reported having been "regular smokers," that is, at some time they had smoked daily for at least a month.
- Almost three-quarters (73%) of these "ever regular" smokers had tried to quit smoking at least once and three in ten (31%) had tried to quit three or more times.
- At the time of the survey, only 17% of adolescents who described themselves as ever having been regular (daily) smokers had quit successfully and had not smoked any cigarettes in the past 30 days. Most ever-regular smokers (83%) reported smoking cigarettes recently and half (51%) smoked cigarettes every day.
- Most students who used cigarettes had tried to quit smoking. Among students who reported daily smoking, nearly three-quarters (74%) had tried to quit at least once. Over one-third (36%) had made three or more (unsuccessful) attempts to quit. One out of 14 daily smokers (7%) had tried to quit smoking ten or more times.

* * * *



* Statistically significant change from 1995 to 1999, $p. < .05$.

Results: Obtaining Cigarettes

- Over one third (36%) of students who had smoked cigarettes in the past month usually obtained their cigarettes by buying them in a store (convenience store, supermarket, or gas station). This represents a significant drop from 1995, when 48% of recent smokers reported that they bought their cigarettes in a store. (See Figure D, above.)
- Although sale of tobacco products to underage youth is illegal in Massachusetts, 27% of students who had smoked in the past month and who were age 17 or younger reported that they usually got their cigarettes by buying them in a store.

- From 1995 to 1997, adolescents increasingly reported being asked for proof of age when they tried to buy cigarettes in a store (49% to 61%). Unfortunately, this positive trend was reversed in 1999, when only 55% of youth trying to buy cigarettes were asked for proof of age.

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TOBACCO USE AMONG MASSACHUSETTS HIGH SCHOOL STUDENTS, 1993 TO 1999

	TOTAL			
	1993	1995	1997	1999
Any cigarette smoking, lifetime	67.8	71.5	69.1	67.4
9th grade	64.4	68.9	62.3	62.6
10th grade	62.3	71.0	72.0	68.5
11th grade	72.8	72.0	69.3	68.1
12th grade	73.0	74.8	73.8	71.1
Recent cigarette smoking	30.2	35.7	34.4	30.3
9th grade	28.9	32.3	27.8	25.1
10th grade	25.2	34.8	35.8	29.2
11th grade	31.0	37.7	35.5	31.4
12th grade	35.9	39.1	40.2	36.9
Daily cigarette smoking	11.9	14.6	14.5	12.6
9th grade	8.1	11.8	10.4	8.2
10th grade	9.9	14.7	14.2	10.5
11th grade	14.1	14.6	15.8	15.8
12th grade	15.9	18.0	18.5	16.9
Recent smokeless tobacco use	9.4	8.4	6.0	4.9
9th grade	10.3	8.8	5.7	4.5
10th grade	8.1	8.1	6.8	4.5
11th grade	10.1	8.1	5.6	5.5
12th grade	8.8	8.1	5.3	4.5
Recent cigar/cigarrillo smoking	na	na	na	15.6
9th grade				13.6
10th grade				13.7
11th grade				16.8
12th grade				18.8
Any recent tobacco use	na	na	na	35.0
9th grade				28.2
10th grade				33.9
11th grade				36.3
12th grade				43.9

IN THE SUPREME COURT

OF THE UNITED STATES

[Caption Omitted in Printing]

Order Granting Petitions for a Writ of Certiorari entered on January 8, 2001.